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No. 624

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HARRIET S. HOLTON, as Executrix of Harriet Wood, Deceased,
Appellant,

vs.

ANDREW J. DAVIS, Jr., THE FIRST NATIONAL BANK OF BUTTE, MONTANA, et al.,
Appellees.

TRANSCRIPT OF RECORD.

Vol. III

(Pages 657 to 960 Inclusive)

Appeal from the Circuit Court of the United States for the District of Montana.

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A. Don't believe it would have done a particle of good.

Q. But you differ from the Supreme Court?

A. I do not know.

Q. Didn't the Supreme Court state that there was no evidence to show that Darnold's testimony would be different if he testified again?

A. Nobody on earth, I think, if he could have made an arrangement with Andy Davis that he would not come in and say this affidavit was false; that is my opinion of it.

Q. The Supreme Court thought there was nothing to show Darnold would testify different?

A. No, sir; I do not know what he would have testified if the new trial came up.

Q. This affidavit was the direct confession by the perjurer?

A. Yes, sir; we had that in two affidavits unimpeached. Those same facts.

Q. You say unimpeached, Mr. Toole; didn't the defendants put in any of the evidence on motion for a new trial impeaching Boyce?

A. I believe there were affidavits there that cast considerable reflection upon him.

Q. Let me ask you another thing, Mr. Toole. Is it the practice in Montana on a motion for a new trial for the proposed appellant to make out his case and in such statement show such evidence as he discovers; that then the defendant puts in his affidavits in opposition and if such affidavits in opposition contain new matter, for the appellant to put in evidence to contradict such new matter? A. Yes, sir.

Q. Will you please explain why it was that the plaintiff Talbott did not put in any evidence contradicting the new matter set forth, contradicting the affidavit of the defendant on this motion for a new trial?

A. Well, I did not see from my knowledge of the transactions any necessity of opening up the question of Mr. Darnold's reputation.

Q. Mr. Boyce could have denied this; denied that his reputation for truth and veracity was bad?

A. No, sir; there was certain statements; for instance, the defendants produced affidavits to contradict the affidavits of the plaintiff. My recollection is that these affidavits were introduced there simply for the purpose as showing that Boyce had made the statement to them, that he intended to use this affidavit of Darnold's for the purpose of getting some money out of Andy, and for the purpose of effecting a compromise with the bank.

Q. We will assume, for instance, that you are correct in your recollection; would it not have been an excellent idea for Boyce to have come in with an affidavit in which he unqualifiedly swore that neither one of them told the truth?

A. I do not know how it was that that was not done; I was not here, but I imagine it would not have helped it any.

Q. It would have at least raised an issue of facts; these facts if uncontradicted the Supreme Court was justified in assuming them to be true?

A. As I told you, Mr. Demond, the conversation Mr. Boyce had or that we had with Boyce with reference to what he would accomplish would scarcely justify them in

going into that. I mean this conversation with myself and I think with Col. Sanders.

Q. Mr. Pratt, in his affidavit, refers to an interview with Boyce, in which he says Boyce spoke of this and of that and various other things; we will assume that Boyce came in to make an affidavit to contradict that statement?

A. That I do not know; there were three lawyers in that case. I never done anything in it.

Q. You do not pretend to be responsible for what Col. Sanders did or did not know?

A. No, sir; I did hear that testimony of that kind was expected to be introduced by the defendant, the declarations of Mr. Boyce as to what he intended to do with this affidavit; the use he intended to make of it, I did hear of that.

Q. Well, as a general principle of litigation in this State, it is wise to contradict any allegation of the other side if you can raise an issue of fact, if you can?

A. Yes, sir.

Q. The Supreme Court also remarked it was not embarrassed by any conflict of testimony?

A. That is the opinion of the Court about it.

Q. Don't you think that if you had called the Wehrspauns and if Darnold had not been spirited, or if Talbott had been more vigorous in securing witnesses, that the Supreme Court could not have made that statement?

A. So far as the spiriting away of Darnald was concerned, we never knew about that until after he returned and Boyce got hold of it.

Q. Assuming these things?

A. If we had known of them I think we would have put them in the application for a new trial. If there had been somebody vigilant enough to get hold of it, of course we would have availed ourselves of it.

Q. Now, Mr. Toole, in this year 1898 it appears Andrew J. Davis, Jr., wrote a letter on the 19th day of February, 1890, in which he says his uncle has not fixed his business yet as he wants it to be after his death?

A. Never heard of it until I saw this testimony.

Q. It appears, also, that Mr. and Mrs. Wehrspaun both say, or rather that Mr. Wehrspaun says that he was present at the interview, and that the Judge simply handed some papers and says, "These shall be yours if I do not come back"; it appears Mr. and Mrs Wehrspaun both said Darnold was not present at the house between the first and the sixth of February; it also appears in the present record that the testimony of Andrew J. Davis, Jr., in 1890 was not before the Court at the former trial; it further appears that the affidavit of Darnold was not used for the reasons you have stated. Taking these things all into consideration, no matter why or why not they were not developed, don't you think they were facts which unfortunately did not come before the Court at the former trial?

Counsel for defendats object to the testimony, on the ground that it does not state correctly what the present record shows, particularly in regard to Mr. or Mrs. Wherspaun, neither of whom testified that Mr. Darnold did not call at their house during Judge Davis' illness, but only testified that they did not see him there, and there are al-

so other misstatements as to what is contained in the record, in the foregoing question.

A. I think it would be very important.

Q. Don't you think there were facts which really existed which are testified to which did not come before the Court at the former trial?

A. If the facts you have stated exist now it is quite evident that we never got them at the former trial.

Q. Don't you think, as a lawyer, that if they had been produced at the former trial it might have affected the judgment?

A. Why certainly, I think it very doubtful, but it might.

Q. Is your doubt expressed by reason of the fact that, irrespective of the plaintiff's testimony, the result in the courts of Montana was determined in advance?

A. Oh, no.

Q. Do you mean to say that evidence of this character would have no comparative effect with a Judge or jury in this State?

A. I think this, that there were so many other prominent facts connected with the case that I doubt very much whether this would have had any influence whatever, but as a matter of prudence it certainly ought to have been introduced.

Q. Was there any prominent facts in the case as developed bearing upon the gift except the testimony of Talbott, leaving out Darnold as to the intention to give?

A. I think the authorities hold that that is legitimate testimony tending to show the probabilities where it is claimed it has been made?

Q. Suppose all the evidence as to the intention had been introduced, there would have been no gift at all. How can you claim that the evidence altogether is competent when the question at issue is as to the gift?

A. The question presented is one as to whether or not the gift had been made; the authorities seem to hold that the declarations of intention to give are competent testimony in establishing the gift.

Q. Without anything else?

A. Oh, no; if you stop there and the proof of the gift, intention does not constitute the gift.

Q. When this decision was rendered by Judge McHatton you represented the plaintiff on the appeal I believe? A. Yes, sir.

Q. Mr. Leyson was substituted as the plaintiff when he was appointed administrator?

A. I think so; in the Supreme Court.

Q. And after the decision of the Supreme Court of Montana, is it not a fact that you and Mr. Clayberg both advised Mr. Leyson to take out a writ of error to the Supreme Court of the United States?

A. I believe we tried to get Mr. Leyson to do that.

Q. Is it not a fact that Col. Sanders was of the opposite opinion and advised him not to?

A. I do not believe that I ever talked with him about that point.

Q. In other words, did he do very much in the litigation in the way of trying the case?

A. Well, he was present there, assisted in it, counseled with us, but it seemed to be pretty generally understood that Mr. Root, Clayberg and myself were to at-

tend to most of it; that seemed to be the general understanding. We left Mr. Root dictate whatever he saw proper.

Q. You do not know what instructions Mr. Talbott gave to Mr. Sanders?

A. No, sir; I do not. I only know this, that Mr. Sanders in all of our talks, consultations, seemed to be with us throughout it; that is all I know.

Q. Well, here is a case by the administrator in which your firm was retained and Mr. Clayberg's firm was retained. Do you see any reason why it was necessary to call in another counsel, or Col. Sanders? Don't you consider you were capable of it—your two firms without him?

A. Well, sir, it is said there is strength in a multitude of counsel. My opinion is that too many lawyers are not a good thing to have; besides being expensive, they generally rely too much one on the other.

Q. You had fought Col. Sanders very vigorously prior to 1894 in the Davis estate? A. Yes, sir.

Q. If Mr. Talbott's reason for employing counsel was to get those who represented the heirs who had been fighting the will, he was not successful so far as he got Col. Sanders?

A. No, because Sanders was necessarily employed in endeavoring to probate the will.

Q. I believe Mr. Leyson determined not to take out a writ of error, and he did not take it out?

A. No, sir; he seemed to think after the Supreme Court had given its decision, that he had gone about as far as he was justified in doing.

Q. Didn't he state to you that he had been staying up nights studying the proposition, and had come to the determination there was no federal question involved?

A. I believe he ventured an opinion on that subject, something in about that shape. It is fairness to say of him that he had his own attorneys, and that he had submitted the matter to them, and that they did not think there was any federal question involved.

Q. By his own attorneys you mean, the attorneys representating him as administrator?

A. Yes, sir; I am not sure but what he told me also in that connection that he either had taken the advice of some lawyers in the east or intended to, but I cannot say whether he had or whether he intended to do it; I think there was something of that sort talked about.

Q. Mr. Talbott, as administrator, was your client?

A. Yes, sir.

Q. Was he your client in anything else but this one suit?

A. He was ostensibly our client, but as I told you according to the arrangement with Mr. Talbott we considered ourselves as representing the heirs in opposition to Andy Davis.

Q. You would not dispute the record that you were attorneys for Mr. Talbott? A. No, sir, not at all.

Q. What other proceedings have you represented Mr. Talbott in as administrator?

A. Nothing; never have represented him or been connected with him in any way, shape, or form, in any of this litigation of any kind or description except this bank stock case.

Q. In these other litigations of his and in matters of his general conduct of the estate, aside from the matters in which you appeared for Root, Judge Dixon, John and James Forbis were his attorneys?

A. I think so; to say the least, I never have had anything to do with it. I think they were.

Q. So the curious situation is presented that Talbott in this bank suit had you as his attorney; that Messrs. Dixon and Forbis and Forbis were attorneys against Talbott in the bank suit on the side of the defendant Andrew J. Davis, Jr., but they still remained as Talbott's attorneys in everything else but the bank suit?

A. I am not so positive, but that has always been my impression.

Q. You followed nobody's instructions at all in the conduct of the bank suit?

A. Of course we followed Mr. Root's instructions or we would not have been in it.

Q. Don't you consider that Mr. Talbott, as your client, had a right to instruct his attorneys as to the conduct of the litigation?

A. Yes, sir; and I considered it was his duty that if he knew anything to assist them he should so inform them.

Q. As a matter of fact, he gave you no information except his own testimony?

A. That is all; said he knew nothing more.

Q. Who drew the pleadings for the plaintiff in this bank stock case?

A. Mr. Demond, I have drawn up most always the first drafts of these papers in most all of these proceed-

ings, and we just changed them in certain places and made insertions where we considered it necessary, but I do not remember particularly about that complaint. I am under the impression that Mr. Clayberg drew that up, but I won't be positive. I think he drew that complaint.

Q. What witnesses did you interview with reference to calling for the plaintiff Talbott in the bank stock suit?

A. We did not have any to interview; they were very scarce on our side. The only ones we may have interviewed that I know of was Mr. Boyce. Never heard of any since except what you suggested here.

Q. Did you have any talk with Andrew J. Davis, Jr.?

A. Never spoke to him from the time I was employed by Mr. Talbott in any way whatever.

Q. Mr. Talbott was a witness for Andrew J. Davis, Jr.? A. Yes, sir.

Q. In his capacity as an individual or witness he had certain knowledge of the defendants' case?

A. Must have had.

Q. Being administrator of the estate and the same individual, he carried that knowledge with him as plaintiff, did he disclose to you as counsel all the facts he knew in regard to the defendants' case—what they were going to do?

A. So far as I know—you see, we understood that the only testimony in the case, Mr. Demond, was the declaration of Andy as to his intention to make the gift, and then the facts that transpired which was claimed to have

constituted the alleged gift; that is all Mr. Talbott told us there was in the case; that is all we looked for and we expected the matter to develop itself and we would contradict some of these facts in some way.

Q. Do you know whether Mr. Talbott was subpoenaed for the defendant in the bank stock suit?

A. I know he was present as a witness.

Q. Did Mr. Talbott present any reluctance when he was testifying against himself?

A. I will state I did not see any; he seemed to be very frank in his statements, but that did not seem to help us out very much; he did not seem to be very reluctant; he just seemed to testify just straight along about what he claimed to know, without any hesitancy.

Q. Is it not a proposition of law that where a defendant is disqualified to testify against an administrator, that the plaintiff nevertheless may put in the defendant's declarations, and thereupon the defendant does not become the plaintiff's witness any more than he was before, but can either deny that he made the declaration or correct it, or explain it?

A. I should think that would be the rule; to correct it or explain it or add to it something—

Q. That was said at the time of the declaration?

A. At the time of the declaration?

Q. You spoke of filing a brief in the Supreme Court at Root's request. I presume you mean the Supreme Court of the United States?

A. Certainly that is what I refer to. I received a telegram from your office asking a brief to be sent on.

Q. The point I referred to was as to whether it was

in the Supreme Court of the United States, or the Supreme Court of the State of Montana?

A. I filed a brief in the Supreme Court of the State of Montana, just as my employment as attorney—I think on a telegram from New York, from your office.

Q. You say at the time of the bank stock trial, Root was interested in the estate, in having the suit successful?

A. I take it so, of course. The will was offered for probate, had not been probated, upon the probate of John A. Davis, except some small legacies.

Q. You say the will had not been probated?

A. We were fighting the question of the probate of the will, Mr. Demond.

Q. So Root had not established any interest in the estate at that time?

A. He expected to establish it by defeating the will, or else by a compromise of same; he was interested.

Q. Why did you have copies of the testimony of Talbott and Andrew J. Davis, Jr., in 1890 and keep it—why did you keep them?

A. We had it for the purpose of investigating the questions involved, with direct application to the testimony we might contemplate.

Q. You considered it sufficiently important to have a copy made? A. I did.

Q. You said you had various consultations with reference to putting in Andrew J. Davis, Jr.'s, testimony, and came to the conclusion not to do so?

A. I mean Colonel Sanders, Mr. Clayberg and myself came to that conclusion, and I think Mr. Wallace, Mr.

McConnell and Mr. Gunn also express that opinion; that is as I got it from Mr. Clayberg, except Mr. Wallace; I know I talked with him about that matter.

Q. You say that before the trial you asked Talbott if his evidence would be the same as on the administration matter; that he said it would, and that you then told him you would ask him about it.

A. Got him to commit himself as much as I could.

Q. When it came to testifying he admitted what he stated before and put in some other flyers?

A. Yes, I—

Q. Why didn't you go on to show that he was guilty of duplicity to you as your client, brought out that fact?

A. Because he never was guilty of any duplicity to me.

Q. Except in this particular?

A. In this particular he told me that there might be some other things that occurred to him about it; he did not know it would be varied. He says, as a matter of fact, all I have stated there is correct. It is the sum and substance of all the testimony I can give in the case.

Q. He did not tell you in advance just what he was going to change? A. No, he did not.

Q. He gave you to understand it would be substantially the same as before?

A. Just as he understood the testimony.

Q. You say you met Boyce on the street one day and he told you about this confession of Darnold, and you said you did not care to talk with him about it?

A. Did I say I met Boyce on the street? I met Darnold.

Q. Well, Darnold; you met Darnold on the street and he commenced to talk with you, and you said you did not care to talk with him at all?

A. He began to tell me something about testifying falsely on the former trial, and I did not propose to talk with him about the matter unless there was some one present. I did not want to take any chances on that fellow smirching my reputation as a lawyer.

Q. Do you recognize that a principal can act by an agent, if the agent is duly authorized?

A. Certainly.

Q. Don't you consider that Boyce, in relation to this affidavit, was somewhat in the situation of an agent, Darnold having made him the depositary of the affidavit? Don't you think, then, that if Boyce said he had a right to have that affidavit used, he should have been believed?

A. I most certainly would have if I had not known the additional facts in connection with it. If it had not been stated to me that the affidavit should not be used except under certain circumstances, I would, but there was such limitations that it would require proof of the facts.

Q. You refer to the agreement with counsel?

A. I mean all the counsel that were present there at the time when I first heard of the arrangements made with Judge McConnell; that was up in Corbett's office and the counsel that were present and to whom I refer were W. F. Sanders, John B. Clayberg and myself.

Q. You have testified in the course of your direct examination, without specifying particularly, with reference to various matters Clayberg has told you, and in that

connection you do not claim to have personal knowledge of the truth of what he stated?

A. Not of anything I have stated I obtained from Mr. Clayberg. I only give credence to it from the fact, or in the manner that lawyers usually do to such matters that they are jointly interested in; that is all.

Q. With reference to any conversation Clayberg may have had with Mr. Talbott or Col. Sanders may have had, at which you were not present, you do not pretend to testify?

A. When I testify to anything I know, it must be of my own personal knowledge. These statements that I have made are just simply statements that I gave credence to as a matter of fact, in connection with our business.

Q. Mr. McConnell may have had interviews with Mr. Talbott; Colonel Sanders or Mr. Clayberg may have had interviews with Mr. Talbott at which you were not present, that you would not care to testify to, as you know nothing about them?

A. No, sir; can only testify of my own personal knowledge.

Q. You say that Col. Sanders has had a surgical operation performed; were you present at that operation?

A. No; I say I understood he had. I know nothing about it.

Q. You say he is not now in Montana?

A. Well, I did not say so; you are mistaken there, Mr. Demond.

Q. You did not intend to say so, any way?

A. No; I did not intend to say so.

Q. You also say Mr. Clayberg is in Astoria, Oregon. Have you any knowledge of that?

A. None whatever, except that it is so reported.

Counsel for complainant move to strike out all of the testimony of the witness as to all conversations with Clayberg, as to what Clayberg told him, and all statements made by the witness of which he has no personal knowledge, including the surgical operation of Col. Sanders and with reference to the whereabouts of Mr. Clayberg, and all other testimony of the witness, to which objection is taken as hearsay.

Q. I understood you to say this. Speaking about Darnold's trip you said, that "afterwards I heard something about his trip, but this was after the time for taking affidavits had expired." You necessarily must have heard something about his trip before the affidavits were made?

A. I knew he had gone away from here, but I never heard anything in connection with the circumstances attending his trip, who he was with or where he had gone, until after the time for taking testimony. I think it was when he returned here, probably two or three or four weeks after that time, but I won't be positive; it is hard for me to get at.

Q. Are you not mistaken again?

A. I do not say I am mistaken in this.

Q. I am asking you another question. Mr. Boyce's affidavit was filed on the 21st of July, 1894; in that affidavit the full details as to Mr. Darnold's trip to Piqua, Ohio, is contained. So, then, you necessarily, you must have known—

A. Necessarily must be mistaken in that respect; yes, sir. If that is contained in Mr. Boyce's affidavit, I am mistaken about the date of it.

Q. The affidavit describes his going to Piqua, Ohio, with Meyer Gansberger?

A. Well, then, I am mistaken as to when we obtained that information. We obtained it before the motion for a new trial was my impression. I was thinking we did not get that information until afterwards.

Q. You say that Mr. Welcome was at Virginia City during the trial; why didn't you send down and subpoena him?

A. He was engaged in the trial of a case and gave us to understand that he would be here. My recollection is, Mr. Demond, that we all stated to the Court the situation of it, and that we expected to find him here, and it was agreed that his testimony should be taken afterwards; after all the testimony on the part of the defendants had come in, and we could not get the case laid over another day, and it was either a day or two afterwards, Mr. Welcome came back here.

Q. If that is the case, why didn't you take his evidence after the other evidence was in?

A. Could not do it.

Q. Thought you said there was an arrangement?

A. Yes, sir, but the case was closed; if he had come here before the testimony had closed, of course we would have taken his testimony, but the argument was over, everything was over when Mr. Welcome returned from Virginia City.

Q. Is it the practice in Montana that if an attorney who is a witness is engaged in the trial of a case that is a legal excuse?

A. No particular practice whatever—if the Court would take.

Q. Have you not a statute or rules which give it the force of law that the engagement of counsel is a legal excuse?

A. No, sir; I do not know of any such rule. I should think it ought to be a pretty good reason for the continuance of the case.

Q. Is it not a reversible error in court proceedings?

A. That depends a good deal upon the circumstances; a question of diligence and all those kind of things. I do not think there is any particular rule with reference to it.

Q. Was Mr. Welcome's affidavit, when it arrived here, one day late?

A. I say that is my recollection of it.

Q. Is it not possible, Mr. Toole, that it was not filed until too late, but that it arrived here before?

A. If that is true, I do not know it.

Q. For all you know it might have come to the custody of Col. Sanders?

A. I do not know how it got on file, but I do know that the very moment we learned Mr. Welcome was in Minnesota, we sent telegrams to him to forward his affidavit at once.

Q. Mr. Welcome testifies that on the 19th day of July he expressed it here from Minnesota; that in ordinary or due course of express or mail it would take two days to

reach here, then that would make it the 21st of July. Now, in the ordinary course of events it would have arrived here on the 21st, one day before the last day—the 22d. You know of no special circumstances why it was delayed? A. I do not.

Q. You had nothing to do with putting it on file?

A. I do not remember that I did not, but it is a very sure thing that if that deposition had come to me in time, knowing as I did when the time for filing these affidavits expired, that I should have hunted up the clerk at any hour of the night and had it filed.

Q. So, then, as you did not put it on file, it might have come to any other attorney in the case?

A. I can only say he was directed to send it direct to the clerk.

Q. If that was done it was in writing—telegram or letter? A. It was no letter it was a telegram.

Counsel for complainant moves to strike out the statement of the witness as to what was communicated upon the ground that the writing is the best evidence; the contents of the telegram cannot be given.

Q. Assuming that this affidavit arrived one day late, Mr. Toole, why did not the plaintiff's attorneys make immediate application to the Court for an extension of time to file papers upon the ground of some unforseen event, so as to make it competent?

A. According to my recollection of it, we had pressed the entire limit of the time that the Court was authorized to make extensions of that kind without the consent of the attorneys: I do not suppose that there was any possibility of getting an extension of time.

Q. I presume the Court had power, had it not, to grant it?

A. I think, Mr. Demond, that we have got this kind of a provision with reference to that; that the Court may extend the time for filing these matters—statements on motion for a new trial not exceeding thirty days, except by the consent of counsel, and I got this time extended by the consent of counsel, and it was pretty hard work to do it, after the thirty days' time was up, whenever the record shows it was, I do not know what it was.

Q. If you had the consent in the first place, the Court's power would not be taken away?

A. That is true, to a certain extent. I have always considered that question to mean this, the Court might extend it to any one time not exceeding thirty days, but I believe our Supreme Court has given a different version of it.

Q. You did not intend in your direct examination to negative the truth of the allegations in the bill of complaint, so far as they were directed against the defendants in any way?

A. No, sir. I never knew anything in the world about that. I never intended to negative them except so far as I myself am concerned, and so far as my knowledge extends with reference to the matter.

Redirect Examination.

(By Judge DIXON.)

Q. You said on your cross-examination something in regard to Mr. Darnold being at Gregson Springs, and also that he had been spirited away or had left the State of Montana.

A. Did I say spirited away?

Q. I do not know whether you used the word or whether Mr. Demond used the word.

A. I do not know anything about that.

Q. In regard to his being spirited away or being absent, do you know anything about these matters, of your own knowledge, or have you merely stated what you understood or heard?

A. Merely said what I have heard; know nothing in the world about it.

Counsel for defendants move to strike out all of the foregoing cross-examination relating to what the witness has stated about Darnold being taken away from the State of Montana, and being at Gregson Springs, on the ground that it is hearsay evidence.

Q. You stated also about Mr. Welcome being at Virginia City and afterwards in some place in Minnesota. Do you know this of your own knowledge?

A. I know just exactly in this way; we sent and received telegrams from him.

Q. What I mean is you heard that?

A. I do not know of my own knowledge, of course, because he was not here, and I could not say where he was.

Counsel for defendants move to strike out all of the foregoing testimony of the witness of cross-examination as to Mr. Welcome being at Virginia City or Minnesota at any time, on the ground that it is hearsay, for the same reasons that the complainant has given in moving to strike out other testimony of the witness which he has drawn out himself.

Counsel for complainant asks the Court to take note that the motion to strike out is too late, upon the ground that no objection was made to this evidence at the time of cross-examination, and that a motion to strike out cannot be made unless, the objection is seasonably made.

Q. The brief had been prepared and filed in the bank stock case in the Supreme Court; did I understand you to say that it was put in at the request of the firm of Logan & Demond?

A. No, sir; it was put in at the request, I think, of Mr. Root. Mr. Root, before he left here, had suggested to me that he would like for me to put in a brief. I afterwards understood that Messrs. Demond & Harby had copies of the brief of Mr. Clayberg in rely to the original brief that I had filed in the case, and had come to the conclusion that there was nothing I could furnish that would assist them in any way, and had concluded not to file any brief in it. I received a telegram, however, from Mr. Root in New York, sent from the office of Messrs. Logan, Demond & Harby requesting me to forward a brief. I got a stenographer, sat down that night and prepared a brief, had it published the next day, and sent it off the next day.

Q. Was it used in the case?

A. Yes sir; it was used in the case, as I understood.

Q. Is that "Root" you spoke of during your examination Henry A. Root?

A. Henry A. Root; yes, sir.

Q. Was he an attorney at law?

A. Yes, sir; he is an attorney at law.

Q. Had he been admitted to practice in Montana, do you know? A. I think he had.

Q. Was there any question in this Davis estate, Mr. Toole, as to Mr. Root and the parties associated with him, being some of the heirs of the estate, unless there was a will?

A. None whatever; of course he was a nephew; admitted throughout.

Q. The question was whether the estate went to the heirs of which they were a part or whether there was a will?

A. Whether it should be disposed of under the will or whether it should go to the heirs at law or next of kin was the only question.

Q. And a compromise of Root and his associates as to the will contest was afterwards made, was it not?

A. Yes, sir.

Q. So that they were to receive certain shares of the estate? A. Yes, sir.

Q. Do you know about what time that was—was it before the trial of the bank stock case, do you know?

A. There were two agreements made, one recently.

Q. I mean the original one.

A. I cannot remember the date of that, Mr. Dixon, I could not say whether it was before or after the institu-

tion of the bank stock case. I am rather of the opinion that the bank stock case was instituted in 1893, was it not? But I won't be positive about it whether it was or not.

Q. You were asked on cross-examination by Mr. Demond what was the practice here in regard to fling affidavits on motion for a new trial, and I understood you to say that the party moving filed affidavits, then that the other party filed affidavits in answer, and then that the party moving could file still further affidavits.

A. I did not so understand Mr. Demond.

Q. He spoke of counter-affidavits; what did you understand by that?

A. I understand a counter-affidavit under our practice to be unnecessary; counter-affidavits would be the affidavits to reply to them, and I know of no practice here that authorizes any question of a counter-affidavit to a counter-affidavit, so that I do not exactly catch the idea.

Q. So you know of no practice of that kind?

A. I do not.

Q. The counter-affidavits put in by the party opposing the motion conclude the affidavits?

A. That is right as it seems to me.

Q. Mr. Darnold was back here in Montana, you say, immmediately after the trial?

A. I saw him that time that he and Mr. Boyce came to my office, and I never have seen him since.

Q. Well, that was after the trial? A. Yes.

Q. And during the motion for a new trial?

A. Yes.

Q. How long have you been acquainted with W. F. Sanders? A. Oh, I think 33 or 34 years.

Q. Has he been engeged in the practice of law in Montana?

A. Yes, sir; all the time, I think.

Q. Are you acquainted with his reputation during that time as an honest; honorable attorney?

A. Yes, sir.

Q. What is it? A. Good.

Q. How long have you been acquainted with Mr. Clayberg?

A. I have been acquainted with Mr. Clayberg ever since he has been in the State, but I cannot recollect exactly how long.

Q. Several years?

A. Yes sir; probably twelve or fifteen.

Q. Has he been actively engaged in the practice of law since you have known him? A. He has.

Q. Do you know what his reputation is as an honorable honest attorney in the State? A. It is good.

Q. Do you think, Mr. Toole, that either Col. Sanders or Mr. Clayberg, if they had desired to do so, could have done anything in this bank stock case to favor Andy Davis, or to prevent Talbott or the heirs from succeeding in the case, without your knowledge of it?

Counsel for complainant objects to this question as speculative, and as calling for the witness' opinion on matters not constituting opinion evidence and as hearsay, irrelevant, and immaterial.

A. Possible, but not at all probable.

Q. I believe this bank stock case was brought about

December, 1893; do you remember if that was about the time? A. Yes, I think so.

Q. Do you know, whether or not before that time any demand or request had been made by Mr. Root, interested or claiming to be interested in the Andrew J. Davis estate to institute a suit on the bank stock or to take any steps in regard to it?

A. You mean any demand, Mr. Dixon.

Q. Yes.

A. Never knew of any demand being made upon—I never knew of any demand being made upon him by any of the people that Mr. Root that represented or that Mr. Clayberg himself represented to anyone else.

Q. Do you know of anything done by Mr. Sanders, or by Mr. Clayberg or any other of the attorneys on the part of the plaintiff in this case, towards in any way assisting Andy Davis in the bank stock case, or to prevent the case upon the part of Talbott and the heirs from being fully tried upon its merits?

A. Certainly not. Mr. Andrew J. Davis had his own lawyers, Mr. Clayberg, Col. Sanders, and myself represented the heirs, and if they or any of them aided Mr. Davis in any way to secure that bank stock, their license should be taken away from them and furthermore; they should be condemned in the community in which they live.

Q. You were cross-examined by Mr. Demond as to what you considered some of the duties of Mr. Talbott in this bank stock case as administrator. I will ask you now whether or not you considered it his duty to hire

testimony in that suit in his own favor as administrator.

A. Certainly not.

Q. I will also ask you whether or not you considered it his duty to get witnesses to testify to anything that was not true. A. Certainly not.

Q. And whether you considered it his duty to attempt, through his counsel or otherwise, impose upon the Court in relation to any of this evidence that was introduced or any evidence that could be introduced in the course of the trial. A. Certainly not.

Q. You were also asked in regard to these books of James R. Boyce, Jr., & Company why you did not introduce them. In your opinion as an attorney, Mr. Toole, would you consider it the duty of an attorney, or would you consider it honorable on his part to introduce books such as these you spoke of and endeavor to convince the Court from them that Mr. Darnold was keeping books and in the employ of James R. Boyce, Jr., & Company, when the books themselves would show that many of the entries were in another person's handwriting without disclosing that fact to the Court?

A. No; I would not consider it proper to do it, nor would I consider it proper for Mr. Boyce to disclose the fact that these books were kept long after or for a considerable period after he was discharged, and I would not consider it proper to introduce these books, or attempt to introduce them to the Court or the jury upon the theory that they disclosed the fact that he had not quit the employment of J. R. Boyce, Jr., & Company until after all the entries that appear in the books were made. I would not consider it honorable practice.

Q. You spoke of Mr. Talbott's having expressed an opinion that this gift to Andy was not valid. Don't you remember that he said about that, he had an idea it was not valid because there was no transfer upon the books of the bank?

Counsel for complainant objects to this, first, as leading; and second, as not proper redirect examination; as counsel has gone into the subject matter of that question.

A. I cannot remember, Judge Dixon, exactly what it was in reference to that matter. My memory is pretty clear upon the proposition that it was an assumption upon the part of Mr. Talbott to give a legal opinion as to the effect of the gift, but what particular matter it referred to I cannot remember.

Q. Do you remember what reason he gave because he thought it was invalid?

A. They were reasons that he thought it was not good in law; that is about the substance of it; that was the point, I think. Probably it might have been as you say, because they were not transferred on the books of the company, or something of that sort.

Q. You say you know nothing about Mr. Wehrspaun's having stated that he heard something said about the gift at the time?

A. Never heard of it until to-day; never read his testimony.

Recross-Examination.

(By Mr. DEMOND.)

Q. Do you know whether or not Mr. Talbott had any knowledge of that?

A. No, I do not. I only know this, that we thought possibly they might know something; and as I understood it, an effort was made to ascertain something that would be beneficial to us from Mr. Wehrspaun, Mrs. Wehrspaun, and her daughter. There was three of them, I think. I have not thought of this matter since the trial.

Q. Did you ascertain anything?

A. No, sir; not to my knowledge.

Q. Nothing that you considered of any importance?

A. Importance—no.

Q. Do you know whether or not Mr. Root made any inquiries about that matter?

A. I cannot tell whether he did or not, but I remember he employed some one; but Mr. Root was impressed with the fact just as the attorneys were, that as Judge Davis lived out there and made his home there, and that this alleged gift purported to have been made at that house; that certainly it was proper that some efforts should be made to get their testimony, and I think it was made, but, as I understood it at the time, they were making some claim against the estate to an ownership of certain property, and we had come to the conclusion that probably that was the reason why we could not get anything from them. I remember that was talked of.

Q. In answer to questions asked you on cross-examination, Mr. Toole, you spoke in regard to the witnesses who testified upon the trial of the bank stock case as to the intention, as to the declarations by Judge Davis of his intention to give Andy the bank stock.

A. Yes, sir.

Q. I will ask you if you are acquainted with these persons.

A. I think with the exception, perhaps, of one, I was acquainted with all of them, had known most of them for a very long time.

Q. Were they or not well known in Montana and this community? A. Yes, sir.

A. (Continued.) They were exceedingly prominent men; all of them, that I know.

Q. What was their reputation or standing in regard to reliability and veracity?

A. Oh, I think good. I think a man could make himself ridiculous to attempt to assail any of these witnesses, unless it was that fellow Darnold, and I do not know anything about him. I know that Darnold, or somebody did testify about it and they said he was willing to testify he was a drunken loafer. I would not swear anything about his reputation for truth and veracity.

Q. You said, I believe, in relation to Mr. Talbott, that you had heard that it had been reported that he kept—I believe you said he kept a saloon?

A. I know that.

Q. And that he had been engaged in gambling?

A. Yes; I have heard that, I think.

Q. When was that?

A. I did not say he was engaged in gambling; I have heard, I think, that he kept a gambling house.

Q. When was that?

A. That has been quite a long time ago.

Q. How long do you think?

A. Well, somewhere from 15 to 20 years.

Q. Did you ever hear anything against his reputation as a gambling man?

A. I believe he stood pretty well in that line; he was regarded as an honorable gambler.

Q. Never heard he was a dishonest gambler, did you?

A. No, sir; never did.

Q. How long have you know Mr. Talbott in Butte?

A. I think it was somewhere about 15 years.

Q. What business was he engaged in, do you know—some years before Judge Davis died in 1890?

A. He was engaged in mining, run mills and mines here.

Q. Was he in the employ of Judge Davis?

A. He was, I think.

Q. As superintendent?

A. Superintendent for quite a number of years; I so understood it.

Q. Was he at the time of Judge Davis' death?

A. Yes, sir; I think he was attending to his mining operations at that time.

Q. What business has he been engaged in since, do you know?

A. Since then he has been engaged in the banking business, and connected with the First National Bank here as an officer in it, I think, during Judge Davis' lifetime; that is my recollection that the books show that.

Q. Do you know what Mr. Talbott's reputation was as a man of honesty and veracity in this community?

A. In this community here I would scarcely know what to say about it. Mr. Talbott is a man that is known

pretty well in the country I live in, in Helena, known by old timers there for a long time. All I can say is, that I know nothing derogatory to his character—I cannot recall anything.

Q. Do you know whether or not he is regarded as a reliable responsible business man?

A. Well, from the position he has held here for the last fifteen or twenty years, being the only matters to my knowledge, I would say he would be so regarded. I do not know particularly of my own knowledge about that.

Q. When Mr. Talbott was appointed special administrator of the Davis estate was he not obliged to give a large bond?

A. Yes, sir; he was obliged to give a large bond.

Q. Do you remember how large it was?

A. Well, it strikes me it was two million dollars, but I will not be sure; I am not certain.

Q. It might have been more? A. Yes, sir.

Q. He gave that bond and qualified?

A. Yes, sir; he did.

Q. You stated on cross-examination something about your being somewhat suspicious in regard to this gift transaction. I would like to question you more fully as to what you meant by that.

A. I tried to explain it pretty thoroughly in my argument. You want my opinion, the causes that produced it?

Q. Yes, sir.

A. It appeared, according to my memory of the testimony, that Judge Davis, Andy, and Mr. Talbott were

seated at the table where there was a pen and ink, and the alleged gift, and that Judge Davis had been signing some deeds upon a settlement that was being made between him and Mr. Talbott, and had all the facilities for the transfer of this stock at his command there, and I considered it a suspicious circumstance connected with the case that it was not done; that is all I propose to say with reference to it; that is the only thing I know of.

Q. Not anything, then, in reference to Mr. Talbott, personally, or in regard to the close relations he had had with Judge Davis?

A. Simply with regard to the facts I have stated.

Q. You said, Mr. Toole, in regard to some hypothetical question put to you by Mr. Demond that under the laws of this State the ground for excluding a juror from a case that he stood in relation of debtor and creditor to the party?

A. I said, if that is the law; he put it in a hypothetical way.

Q. I will ask you if you remember that that was not the law until the new code was passed in 1895.

A. No; it was a new law passed on the first of July, 1895; it is not made a ground of charge.

Q. It was not before?

A. Don't think it was; in fact, I am very sure it was not.

Redirect Examination.

(By Mr. COTTER, Counsel for John H. Leyson.)

Q. Mr. Toole, at the time Mr. Leyson consulted you, and you advised him to take an appeal in this case—the bank stock case—to the United States Supreme Court and prosecute a writ of error, do you remember that Mr. Leyson asked you the question as to what encouragement you could give him as to the ultimate success of the appplication?

A. Yes, sir. I remember that Mr. Leyson wanted me to say that we could succeed in it before he would do it, and I told him that it was a mixed up proposition, but one I thought should be tested.

Q. Is it not a fact, Mr. Toole, that you assumed as a reason why the writ of error should be prosecuted that there was a great deal involved and you thought it should be prosecuted for that reason?

A. Yes, among others.

Q. Is it not a fact that he refused to prosecute unless you venture an opinion as to the ultimate success of the application?

A. He wanted more than an opinion. The opinion I gave him was that it was a pretty close question, but I could not give him assurance how it would be determined, but that in my judgment it should be decided.

Q. That is the extent of your opinion?

A. That is the extent.

Q. You said, also, Mr. Toole, Mr. Leyson consulted his counsel? A. He said to me so.

Q. Do you know whether or not he consulted the counsel who were in anywise connected with the estate?

A. I think he told me that he had taken counsel who were in no way connected with the estate, and my impression is that it was yourself and Mr. Scallon, but I am not sure.

Recross-Examination.

(By Mr. DEMOND.)

Q. Although you personally did not know where Mr. Darnold went to, is it not true that you and Root and the rest did your best to find him but could not?

A. Yes, sir; we knew he was gone.

Q. Now, Mr. Toole, is this true, that if a motion is made upon an affidavit for a new trial so alleging that the witness has been very ill and could not come to the trial, and that is filed and the defendant comes in with an affidavit that the witness is unworthy of belief, and has been in the penitentiary twenty years, do you mean to say that under your practice there is no way of contradicting that affidavit?

A. I do not remember of any such question coming up. I do not know what decision a Court might make upon that. As a matter of correct practice I think that the rule should be as you suggest, that rebutting affidavits should be allowed.

Q. Is it new matter? A. No, sir.

Q. You say that you and Clayberg represented the heirs. You do not mean that you represented them of record, you were attorneys for Talbott?

A. Mr. Talbott simply told us that he was employing us on behalf of the heirs to recover this stock from Andy.

Q. You never rendered any bill to my client?

A. If you mean Harriet Wood, the plaintiff, no, sir.

Q. You never consulted any of the heirs except Mr. Root and his associates?

A. That is all; Erwin Davis was not here, Mrs. Ladd nor the others.

Q. You would not claim that they owed you money for services in the bank stock case?

A. Not at all.

Q. When you say you do not think any of the counsel for the plaintiff ever aided Mr. Andrew J. Davis, you are speaking only for yourself?

A. That is all; that is merely my opinion.

Q. You say you never heard that Wehrspaun was present or might have been present at the time of this gift until to-day?

A. Well, sir, if I ever did it has escaped my memory.

Q. The record to which I have called your attention, in which Mr. Talbott says the Wehrspauns may have been present, when he was testifying at the trial?

A. It has escaped my mind, but I think there was something said about their having passed through the room, and we tried to get the testimony of the Wehrspauns, the three of them but failed to do it.

Q. But as to your knowledge of what Mr. Talbott said on the stand in 1894 when you were present that there might have been somebody in the house, calling your attention to the fact at that time?

A. Well, that might have been one of the causes that

induced us to interview the Wehrspaun family. I do not recollect it; that is something that seems to have escaped my memory.

Q. You said that all of the witnesses for Mr. Andy Davis were prominent men?

A. All that I knew of; old timers here. I think I knew all of them.

Q. For what was Mr. James A. Talbott prominent?

A. Well, he is a man very well known in the community here; but my answers to this question, you will remember, Mr. Demond, was with reference to the particular persons you named in the bill of complaint.

Q. You were not referring especially to Mr. Talbott?

A. No, sir, I was not; but he is quite a prominent man here.

Q. For what was Mr. Daniel W. Dillinger prominent?

A. An old-time citizen here; known everywhere.

Q. What had he ever done that you would consider him as a prominent citizen?

A. Don't know of anything.

Q. Would you say Mr. Lavelle was a prominent citizen? A. Yes, sir.

Q. What has he ever done to make him prominent?

A. Do not know.

Q. Take Mr. McCrackin; is he a prominent citizen?

A. Yes.

Q. What did he ever do?

A. I do not know of anything in particular.

Q. I have asked you about several witnesses at the bank trial; you have said they were prominent, but have not assigned any reason for their prominence. Would

the same be true of the other witnesses in the case—would you consider that they were prominent, without stating any special reason?

A. I do not understand; generally, they are prominent men.

Q. But you would not state any particulars as to why they are prominent, as to what they have done in art, literature, or war?

A. Nothing of the kind as to an exhibition of patriotism, or anything of that kind.

Q. You have testified to the effect that, so far as you have heard, Mr. Talbott was a gambler on the square?

A. Yes; I have always understood that; that is, at the time it was understood he kept a house of that kind.

Q. And so far as the house was concerned, it was run on the square? A. Yes.

Q. You have spoken something of Mr. Talbott's reputation as a financier and prominent citizen; have you ever discussed his reputation?

A. Never heard it discussed to my knowledge; do not recollect.

Counsel for complainant moves to strike out the testimony of the witness as to Mr. Talbott's reputation, for the reason that the witness has never heard it discussed and therefore cannot know it.

Q. You say Mr. Talbott has been engaged in banking recently. You remember, do you not, that when Judge Davis died he owned 950 shares of the bank, there being 1000 shares in all?

A. I believe it was 950 shares he owned.

Q. The other 50 shares stood in the name of the directors and were claimed by the estate under contract?

A. Yes.

Q. When Judge Davis died the evidence shows Mr. Talbott was director and has since been elected vice-president of the bank, and Mr. Davis has testified that he has transferred stock of the bank to Talbott for no consideration. Does not that fact raise in your mind a suspicion as to Mr. Talbott's connection with the bank?

Counsel for defendant object to this question as immaterial and irrelevant, not calling for a fact but an opinion, in that it is calling for a suspicion.

A. Well, if I knew all about what services he might have rendered to Mr. Davis, and in respect to what particular services it might be, I would be in a better situation to know something about it.

Q. Do you know anything about Mr. Talbott's history up to the time of Judge Davis' death which peculiarly qualified him to be a prominent financier?

Counsel for defendants object to this question upon the ground that there is no evidence introduced to the effect that Mr. Talbott ever was a prominent financier, and therefore it is not proper recross-examination.

A. No, sir, I do not, except that Judge Davis I regarded as a very prudent business man, and had him employed as his superintendent in his mining business, Mr. Demond. I think he was a director in the bank, but I am not sure of that.

Q. I will ask you this: Is it not true, so far as you know about him, his previous history has been as stated by you, commencing with the gambling-house, superin-

tendent of mines, up to the time of the Judge's death—possibly director in the bank?

A. I have know him more particularly in that way.

Q. Have you ever known Mr. Talbott at all so well as to know whether he is a man of education.

A. I should not take him to be a man of any very extraordinary education, but I would take him to be a man of more than ordinary sprightliness.

Q. So far as you know there was nothing which peculiarly qualified him to be director and vice-president of a bank?

A. No, sir; I do not know of anything that would specially qualify him for that business. I would say this, however, Mr. Demond, I think possibly, so far as the managership of a bank is concerned, he in many respects might be a valuable man on account of his knowledge of the country and the people.

Q. You would not select him as a man to determine a financial problem? A. No, sir.

Q. He would not be a good candidate for comptroller of the currency? A. No, sir.

Q. When this bank suit was going on the proponent of the will was John A. Davis?

A. The proponent of the will was John A. Davis, a brother of Andrew J. Davis, deceased.

Q. If the will was probated, he would get almost all of the estate?

A. With the exception of small bequests to Pet Davis and Mrs. Bergett.

Q. Andrew J. Davis, Jr., was the son of John A. Davis? A. Yes, sir.

Q. So that if the stock had been secured by Talbott in this bank stock suit, and the will had been probated, John A. Davis would have got the bank stock?

A. Yes, sir.

Q. And then his proportionate part as an heir of John A. Davis of the balance of the property?

A. Yes, sir.

Q. So that both Andrew and John A. were interested in getting the bank stock if the will was probated?

A. I would hardly say John A. would be interested in Andy getting this bank stock. John A. Davis was a brother and under the will would have held as a residuary legatee. Aside from the few bequests I have mentioned, which were life estates as I remember it, and of course if the will had been probated John A. Davis would have gotten all of the estate of Andrew J. Davis, and if the bank stock had been regained as a part of the estate, he of course would have received that.

Q. So that really in Talbott's bringing the suit he was bringing it for those ultimately entitled to it; but if the will had been probated John A. Davis would have gotten it all—if the bank stock suit succeeded and the will was probated?

A. John A. Davis would have gotten it all under the will if there had been no kind of settlement.

Q. So that you were representing, you still were representing John A. Davis in the bank stock suit, if the will was probated?

A. We were in the situation where if the bank stock was lost we had no chance for it at all, but in the event

the will was denied, we had an opportunity of getting the proportion the heirs were entitled to.

———————.

Subscribed and sworn to before me this —— day of ————, 1898.

———————,
Special Examiner.

Cross-examination of N. W. McCONNELL, a witness on behalf of the defendants (continued):

(By Mr. DEMOND.)

Q. In your direct examination you stated it was determined to exclude the testimony of A. J. Davis, Jr., given in 1890 as you stated, because counsel could get the same facts from other sources; what other sources did you refer to? A. Did I say that?

Q. As I took it down you stated you could get the facts from other sources and could make a case without him.

A. I do not think you have got my language correct. My recollection of what I said was this: I put the ground of the exclusion of it upon the same ground that Mr. Toole did, that he was not a competent witness and to introduce his admissions against him, as to what he said, or any portion of it on the examination in 1890 would open the door after his examination, as a matter that was introduced, and in that way give him an opportunity to make such explanations as might be of benefit to him. I said further, in that connection that my recollection was that there was other testimony or state of facts established, practically without contradiction; that in our

judgment, under the law, as we understood, would entitle us to a judgment.

Q. Your language as taken down by Mr. Blair, Special Examiner, is this: "We thought it was to the interest of our case to keep him out of it entirely; we thought we could get the facts from other sources that would make a case under the law on which we ought to win that lawsuit without jeopardizing that case."

A. That is precisely what I said, and what I say now.

Q. Will you tell me from what other sources you thought you could get the facts?

A. I do not remember now. I was not at the trial. I did not investigate the facts of the case. I was not upon the ground here; all I know about that was from discussions I had with Mr. Clayberg in regard to that particular testimony I remember. I am not able to answer that.

Q. You say that that referred to counsel in consultation with you? A. Yes, sir.

Q. If you did think you had other sources from which you could get equivalent testimony, cannot you recollect what those sources were?

A. I remember very well two sources. I recollect the statement that Mr. Talbott had made on the same occasion in 1890 that that did not make a gift causa mortis —the version of it he gave, and that I particularly remember, and I remember Judge Knowles' testimony, and that of course was given upon the trial. I do not think we had any knowledge of that or what it would be before the case was heard, but I remember at the time thinking—and I would think so yet if the Supreme Court

had not decided different—that what he said really made a case that would entitled the plaintiff to the recovery of that stock; that is my judgment of it.

Q. You did not, however find any testimony, either of Talbott or Judge Knowles quite so conclusive as the admissions of Andrew J. Davis, Jr., on the stand?

A. I have not seen his testimony since 1894, and I do not now just recall what it was, but my recollection of it is—the impressioin I have of it is, that it was not decisively in his favor it was rather against him.

Q. You remember the fact, however, having been present at the hearing, that the matter referred to—what Andrew J. Davis, Jr., did testify to, was that the gift was to take effect at the Judge's death? If that is the case that he did so state, don't you think that that was more conclusive of there being no gift, than the testimony of Talbott was?

A. I should have thought them both bad. I do not think that that would make a gift causa mortis.

Q. Really, if it was a fact, admitted by Andy J. Davis. Jr., that the gift was to take place at death, if this declaration of the defendant's was the only evidence, it would not be a gift causa mortis under the law?

A. That is my judgment under the law of the case; I know that without delivery and possession, to make a gift.

Q. Delivery to the person, possession and dominion?

A. That is it, yes, sir; of course the possession has got to be an accomplished fact to make a gift.

Q. Now, Mr. McConnell, in 1889, when this gift was made, there was a statute of wills in this State, was there not? A. Yes, sir.

Q. Under the law, as it then existed, if a man desired to give the property that he owned, to take effect after death, he had to comply with certain formalities?

A. Yes, sir.

Q. Among them a written subscription by himself in the presence of witnesses?

A. Yes, sir; in other words, that question of intention to give it by will of itself would not make a will that would pass title to the property upon the death of the so-called testator.

Q. I believe you said that you had the testimony of Andrew J. Davis, Jr., and of James A. Talbott, and discussed the expediency of introducing it, prior to the trial?

A. I did, with Mr. Clayberg in our office.

Q. You though, I believe you said, that leaving out the testimony of Andrew J. Davis, Jr., you could make a case good in the law without Davis' testimony?

A. Well, the other testimony—I remember distinctly that after the testimony was in and I learned what Judge Knowles had testified, that I thought the plaintiff had a case.

Q. Don't you think, Judge, that where there is a proposition a questionable or difficult proposition of fact or law, and you have two witnesses to that effect, it is wiser to use them both than to gamble on the question as to whether one is sufficient?

A. Where there is no danger of using the other, my rule is to put in all I have got.

Q. Don't you think if you had sole control of that case to-day, that in view of all the facts and circumstances that have since developed, you would have deem-

ed it wise to have used the testimony of Andrew J. Davis, Jr.?

A. I am not prepared to say. When I consider a case for the purpose of trying it myself, I weigh every fact and circumstance and consider it a great deal, especially if it is a case of importance, the matter always clears up, that is, my judgment becomes clear and fixed as to the best course to pursue. What I would have done in this particular case, I am not prepared to say; it would be a mere surmise.

Q. Tell me what part you did take.

A. Just exactly what I told you. These office consultations had more to do with the law of the case—Mr. Clayberg was investigating the law; he made elaborate typewritten briefs. I remember distinctly as Mr. Toole testifies that he prepared the argument for the appellant in the Supreme Court. I remember when he was examining the law that we frequently discussed it. I sometimes got the books and read the cases that he had cited, and in that way I kept a running connection with his investigations in our office. I remember this, that this whole case over here connected with the Davis estate was, so far as our firm was concerned, peculiarly Mr. Clayberg's lawsuit; the consultations were with him. I was in some of the consultations in the earlier stages of the case in preparing it for trial, and I remember examining a great deal of the documentary proof, the handwriting, etc., and for that reason I never felt that I was actively engaged in the case or expected to be. I had an interest as stated in my original examination that an at-

torney has in a case he is financially interested in, and personally interested in the success of his partner.

Q. You determined with your associates that leaving out the Andrew J. Davis testimony of 1890, and with Talbott's evidence and such other evidence as you could get, make a case which would be good under the law?

A. That is what we thought.

Q. You found that the Supreme Court of Montana upon these facts determined that you had not made out such a case?

A. Yes, sir; that is what they determined.

Q. Now, then, if you had put in the testimony of Andrew J. Davis, Jr., which is unequivocal upon certain points upon the future developments of the case there could not have been that difficulty?

A. I am not prepared to say what effect that would have. I do not believe that the case could have been made any stronger by any amount of cumulative testimony without taking a different view of the law and the facts.

Q. Or as they existed?

A. As they existed on the record.

Q. You have been justice of the Appellate Court?

A. Yes, sir.

Q. In deciding a case did you deem it proper to go outside of the record? A. Why, of course not.

Q. Therefore the Supreme Court of Montana were bound by the facts?

A. Yes, sir; that needs no argument.

Q. Don't you think it is true, sir, that in a lawsuit that if the plaintiff has in his possession a declaration or

writing from the defendant admitting the cause of action, that that is an important paper or declaration?

A. Yes, sir.

Q. And if there is other evidence to suppose the defendant's case, do you think it wise to exclude the conclusive evidence of the defendant's declaration?

A. I do not know that that was conclusive. If we could have used that testimony without its being in any way modified, I take it for granted it would have been used. The danger was in opening the door for Mr. Davis, whom we knew to be a very astute man, to make such explanations of that as might have strengthened his case.

Q. You did not anticipate that he would deny that he uttered that language on the previous examination?

A. I do not think we did in so many words; we did not know what explanation he might give.

Q. Was it worth while to exclude it on the expectation that he might endeavor to modify it?

A. Upon a mere speculation, no.

Q. Did you know that he would modify it?

A. Of course, we did not know that he would; we knew that he was a very astute man and apt.

Q. In other words, you thought, from your knowledge of his astuteness and general character, the chances were that he would modify it?

A. Yes, sir; he might be able to do it, and do it consistently, and we might find ourselves in an attitude of admitting—or giving him an opportunity to make a case for himself. I was not at the final consultation or de-

termination of it, but I remember that discussion took place. I recollect it as having occurred at the time.

Q. Did you fully consider the great interests at stake, to the widows and orphans who were indirectly interested, by you and Mr. Toole in excluding that testimony?

A. Why, of course.

Q. There was millions at stake. A. Yes, sir.

Q. And here was testimony, which on its face, in view of the law, was apparently conclusive; it was a question of winning the case, and under these circumstances, could there be any excuse for omitting such testimony by the very defendant who claimed the bank?

A. I think so. I do not think the amount involved was the principal feature in the determination of the case. If the amount was less, it would equally be the duty of the plaintiff to make the strongest possible case they could with the facts they had, but of course their anxiety and care and the character of their consideration would be enhanced and intensified by the amount involved, always.

Q. You say that the effect of the decision in favor of the plaintiff would have increased the estate, and would have increased the amount that your clients would have received, and that therefore they would have been in a better financial condition to have paid larger fees?

A. Yes, sir.

Q. Now, you considered yourself retained, of course, in this particular suit by James A. Talbott, as administrator? A. Yes, sir.

Q. You expected, at least your firm expected, to be paid by him?

A. So far as these services were concerned; but we had a fee in the case for the heirs that we represented in the will contest.

Q. Would it necessarily have followed if the bank suit had been won, that Root would have gotten anything from it?

A. I could not say that it would necessarily follow that he would have gotten something from it.

Q. If you gentlemen had won the bank stock suit, and subsequently the will had been probated, and there had been no settlement, the bank would have gone to John A. Davis or his heirs? A. Yes, sir.

Q. You cannot say positively you were interested for Root, because it was a gamble whether he would get anything or not?

A. It was not a gamble; at least, I so regarded that will under the law and in the face of an overwhelming public sentiment in this State. There were certain jurors that would not give in that it was not a gift, and in the settlement under which it was settled, the heirs we represented were well taken care of, so that I felt to defeat that will and get a settlement in the face of it and secure large interests in that estate for the heirs I represented was of a very high order. I never felt that we were going to lose entirely.

Q. Still your firm, Mr. Toole's firm, Corbett & Welcome, Ingersoll and Meyers of New York, with all your ability had fought the will against Dixon, Forbis, Sanders and others, and there had been no conclusion; that is true, is it not? A. Yes.

Q. Irrespective of the merits as to the will contest, it was a pretty difficult proposition to get a jury in Butte to say it was a forgery? A. That is right.

Q. So that, after all, in prosecuting this suit, you looked primarily, of course, to Talbott for compensation?

A. So far as the labor in that suit is concerned, we looked entirely to him, but we knew perfectly well if we succeeded it would throw into that estate that valuable property in contest in that case, which would have to be disposed of in the main case.

Q. Talbott, as administrator, of course as an artificial person was as a matter of law interested to succeed in that suit. Talbott, as a witness, was interested in testifying for Andrew J. Davis, Jr., to defeat that suit. On what side do you think the balance of his interest was—for the suit or against it?

A. That is a proposition anybody can discuss. It is a question to be proven as a fact.

Q. From your experience in the case, did he evince as much interest for Andrew J. Davis, Jr., as he did for himself as administrator?

A. I never came in contact with Talbott in connection with the case. I can only say I have this impression, that Mr. Talbott turned his lawyers loose to do the best they could, and advised them to do the best they could. The very delicacy of the situation required that he could not have *done unless* without subjecting himself to censure of the very severest kind, but as to what object he had, I never heard of his doing anything against the case, and I do not know that I ever heard of his doing anything particularly for it.

Q. So far as your impression is concerned, he was not particularly anxious in this bank stock suit to recover the bank stock?

Counsel for defendants objects to the question as calling for the impression of the witness.

A. I was not in contact with him. I heard nothing and learned nothing in this matter to show that he had any particular interest.

Q. In what different legal attitudes did Talbott stand at that bank trial?

A. Well, that is a matter of law to be adduced from his relations to this suit and to that bank stock and to the defendant, and these facts from which that deduction might be made are not matters within my knowledge.

Q. As plaintiff and administrator, of course, it was his duty to fight vigorously to win; that is true, is it not?

A. I think so; yes, sir. I say "struggle vigorously to win"; that is usually expected, as administrator representing the estate and as holding title to the property subject to certain dispositions of it, as right and justice the law might make. It was certainly his duty to not let it be taken away from him excepting the creditors or heirs at law to whom it belonged, or devisees if it was devised and go to a third party, unless in fact and in truth it belonged to such third party.

Q. The mere fact that he was a witness for the defendant did not affect his legal position as administrator?

A. No, sir.

Q. So that really he had the same duty as a perfect stranger to the whole matter, so far as he was administrator? A. I think so.

Q. You remember that he was also an officer of the First National Bank of Butte? A. Yes, sir.

Q. Suppose he had been a perfect stranger to the litigation, what would have been his duty as an officer of the bank?

A. I think as an officer of the bank, I think it was simply his duty to the bank, or his duty as an officer of the bank, to see that the stock was decreed to belong to the proper owner. The bank had no interest as to who should own the stock, except to get at the truth of it.

Q. Take Talbott in his third capacity as a witness for Davis; should that in any way interfere with his duties as administrator?

A. No, sir; it should not. A man's duty as a witness should never interfere with his legal relations to a case, I do not care who he is. A witness is supposed to tell the truth and the truth should always be heard, and the decision in accordance with it which would be right and just, and as a witness that was his simple duty, to tell the truth.

Q. I believe you said that you had no special conference with Mr. Talbott?

A. I never talked with him at all.

Q. Was the question of impeaching Mr. Talbott by reference to his early record a matter of discussion at all between the attorneys?

A. Mr. Talbott was discussed between Mr. Clayberg and myself a good deal. I did not know Mr. Talbott at all before he became administrator of this estate, before he made application for letters of administration. Possibly I had heard of him, but I had not been in the coun-

try long and I was not acquainted with him. I remember his history being discussed in connection with this lawsuit, and that it was developed very much as Mr. Toole has described it in his testimony. His days of gambling were a considerable period before the time this lawsuit was instituted and took it practically so far back that it might be said to have brought it within the statute of limitations; in other words, that the period of business life had existed and a number of years had intervened, so that practically that part of his history that contained that had nothing to do with the lawsuit.

Q. What were your official capacities in Tennessee? I have forgotten.

A. I was one term of two years a member of the State Senate. Then I was Circuit Judge of the Fifth Judicial Circuit of Tennessee, altogether 11 years.

Q. That was a court of original jurisdiction, at which you tried jury cases? A. It was a Nisi Prius Court.

Q. In your experience on the bench, I presume you had occasion to hear cases in which attempts were made to impeach the testimony of witnesses?

A. Very often.

Q. In Tennessee, at that time, was gambling of such good repute that it would be considered inexpedient to bring out the fact that the witness in an important question was a gambler or a man who had kept a gambling-house?

A. In Tennessee gambling was under the condemnation of a strong moral public sentiment, and no man engaged in gambling who had much character. I used to try gambling cases. I understood the class of gamblers

in that country very well, and there was very few of them you could trust to tell the truth. I recollect a few exceptions; but since I came west I have had occasion to change my opinion as to the character of the men who engaged in gambling. I found that a great many men in this country who were pioneers had established for themselves, when they came here, a code of morals, and they introduced into that gambling upon certain planes where a gambler's word and honor were sacred. He would pay his gambling debts if it took the last dollar he had, and would keep his word. They became educated by that code into standing more upon their honor than men in ordinary vocations of life would do. I could give instances of men of that character with whom I became acquainted in this country. I recollect it was a revelation to me upon the state of gambling.

A. Of course it is true that in a new country a great many men who are very excellent citizens are engaged in gambling, but don't you make a distinction even here between a gentleman of principle who occasionally gambles and the man who keeps the house and pays out the stacks?

A. To a certain extent, yes; yet some of these men who keep the houses are the very character of men I refer to.

Q. There are some people in Montana who disapprove of a man who gambles?

A. They disapprove of that practice, even under the circumstances which I have described. You will find myriads of people of that sort, and they are increasing

now since it is condemned by law and that whole business is condemned.

Q. You do not mean to say that all good, religious church members in Montana approve of a man who has been engaged in gambling?

A. I do not think any men of that class approve of gambling.

Q. So there are some people in Montana even then who would have been prejudiced against Mr. Talbott if they had known?

A. If they had known he kept a gambling-house ten or fifteen years before and had absolutely quit it, I do not think they would condemn him. They would rather applaud him, because he had quit. I do not think it would be brought against him. I believe that the Christian law of forgiveness would have been the doctrine that the best people would have adopted with regard to that class of men. Paul was a murderer, for he held the clothes when Stephen was stoned to death, and yet Paul was a great Apostle, and that is the law of Christians.

Q. If a man had been convicted of murder twenty years ago he still is subject to impeachment, notwithstanding his subsequent record?

A. Yes; that depends on circumstances.

Q. It is legally, at least, a subject of impeachment?

A. If it is twenty years old it cannot be introduced legally. You cannot in this country ask a man to impeach him on the witness stand under our law, whether he has been guilty of an act, not amounting to a crime, unless that act forms a part of the very matter that is being investigated. I know in Tennessee that it could

be done unless it was an old transaction; if it was recent, so that he was not supposed to have reformed, the theory was that the jury and Court had a right to know what kind of a witness was testifying.

Q. Is it not true that even here you can cross-examine a witness as to his whole life for the purpose of affecting his credibility before the jury?

A. By asking him if he has been guilty of criminal acts?

Q. Asking him his whole record.

A. No; unless the matter inquired about is involved in the issue being tried.

Q. If he has been convicted of a crime?

A. I think under our statute that may be shown if he has been convicted, but under our statute we do not allow that character of impeachment; that will enable an attorney to go into the history of a witness and make him confess to conduct that will disgrace him.

Q. Is there not any way, if a witness is produced, to show that he has been guilty of such acts in his life as would render him unworthy of belief?

A. Not by asking him about specific conduct which would tend to impeach him by showing that a person guilty of such conduct is not worthy of belief, but if his conduct has been of such a character that it has become a part of his reputation and goes to the extent of impeaching, then he may be impeached by introducing witnesses who will testify that they know his character, and that it is bad.

Q. You said that Mr. Clayberg is in Astoria, Oregon. You do not mean to say that is a fact from your own

knowledge? I would like to have an answer to that question.

A. I said that from information from a party that came from him.

Counsel for complainant moves to strike out the testimony of the witness as to Mr. Clayberg's whereabouts, on the ground that it is hearsay.

A. I want to be permitted in that connection to state this in behalf of Mr. Clayberg. I saw him just before he left the State and I know the condition he was apparently in at the time. I know he went away in the month of April, but perhaps it was May. I know he said he was going to California, and I have not seen him since. His office is on the floor above mine and we come up in the same elevator.

Q. Don't you think it was unfortunate for the interests of the heirs and for your client, James A. Talbott, that this guarantee was given to Mr. Darnold at the time he made this affidavit?

A. I do not; for the reason that if it had not been given, the affidavit would never have been made and there simply would never have been an affidavit in existence. It was one step to try and get that affidavit, and his absence when we came over here to consider that affidavit with other matters prevented any further negotiations in regard to it.

Q. On the present hearing you have testified to what Mr. Darnold told you when he was present in your office. Have you ever received from Mr. Darnold any permission to discuss these facts?

A. I have not; the communications were not privileged, and when sworn as a witness I have no option about telling them.

Redirect Examination.

(By Mr. FORBIS.)

Q. Judge, I did not hear the first part of your testimony, but there was one question which I intended to propound on your examination in chief, which I desire to propound to you, and afterwards I shall ask you some questions about things I have heard here. In the first place, you have read this bill?

A. The bill of complaint? I have not read it all.

Q. Have you read that portion of it which charges general fraud and conspiracy between Mr. Talbott, Mr. Davis and the attorneys who were interested in both sides of the case? A. Yes, sir.

Q. I wish you would state what, if anything, you know about any conspiracy or any understanding between the attorneys employed by Mr. Talbott in the trial of the bank stock case, and the parties interested in the result of that case, or their attorneys?

Counsel for complainant objects to this question, upon the ground that the examining counsel states that this is a subject that he intended to bring up on direct examination, it properly being direct examination, but that he now attempts to interrogate the witness upon redirect examination; the objection being that this is not proper redirect examination.

A. I think you had better leave the word "unlawful" in there.

Q. From your experience as a Judge and as an attorney, is it your opinion that he would have increased it?

(Objected to upon the same ground as that made to the last preceding question.)

A. I think any reasonable Judge would have increased it on that account.

Redirect Examination.

(By Mr. DIXON.)

Q. I will ask you, Judge, in your experience in the practice of the law, if it has not frequently occurred with attorneys that question arises as to the policy or necessity of putting in certain evidence or of omitting it, or other matters in regard to the conduct of a case that are difficult to decide.

A. It is constantly occurring.

Q. Is it not very difficult in many of these cases to come to a positive conclusion as to what is best for your client to do?

A. Yes, sir; it is often difficult to some to a conclusion that is satisfactory to your mind at the time.

Q. Would it not be much easier, Judge, from your experience as an attorney to try a case if you knew in advance what the decision of the Supreme Court would be?

A. It ought not to be, because a person should make the best they can of what is before them, but if they knew what the Supreme Court was going to do, they might shape their case accordingly.

Q. It would make it much easier for you if you knew what rulings the Supreme Court would make and what view they would take of the testimony and the law?

A. Yes, sir.

Q. Not near as much trouble? A. No, sir.

Q. You did not have the advantage in this case of knowing what the Supreme Court of Montana would decide, did you? A. No, sir.

Recross-Examination.

(By Mr. DEMOND.)

Q. It occasionally happens, Judge, that litigants do know in advance what the Supreme Court intends to decide?

A. I do not think they know; they might think they knew, and might guess right.

Q. Did you ever hear it intimated that the defendant in this bank stock case knew in advance what the decision of the Supreme Court of Montana would be?

Counsel for defendant objects to this question, as calling for a rumor, which is not evidence.

A. I do not think you should ask me that question.

Q. Did you personally ever hear that the defendants in the bank stock suit knew in advance what the decision of the Supreme Court of Montana would be?

A. I do not think I ever heard that.

Q. Did you ever hear it discussed between yourself and your associate counsel?

A. I decline to answer that question.

Q. Was it not a serious matter of consultation among the counsel for Mr. Talbott, this very question as to whether or not the decision of the Supreme Court of Montana had been known in advance by the defendants?

A. I do not think I ever heard that discussed.

Q. Do you remember who composed the Supreme Court, who decided the bank stock case?

A. I do not recollect just when it was decided.

Q. Judge Dixon has asked you whether it would not be easier to try a case in this State if you knew in advance what the decision of the Supreme Court would be; you remember the question? A. Yes, sir.

Q. It is a fact, is it not, that it is easier to try a case if a man knew in advance what the decision of the Supreme Court would be?

A. Of course, I understand that question to mean this: That we stood in the position where we did not know what the views of the Supreme Court were going to be. You stand in the position of knowing what they have done, and you are trying *in* now in view of what they have decided. That is what I understood counsel to mean.

Q. I think, no doubt, Judge McConnell, you are correct, though you and your associate counsel when the bank suit was lost did not know what the Supreme Court of Montana would decide, but you do not go so far as to say that as a matter of fact the defendants did not know that?

A. Of course I do not know what they knew. I think Judge Pemberton, Judge De Witt and Judge Hunt were on the bench when this was decided, but I will not suffer myself to believe for a minute—

Q. You have no knowledge on the subject?

A. I have no knowledge on the subject that they let

anybody know how they were going to decide the law-suit—I do not believe it.

Q. In speaking of the allegations of the bill of complaint, you deny certain charges claimed to have been made against the attorneys for the plaintiff. Do you go so far as to say that you know that none of the charges made against the defendants were true—in the bank stock case?

A. I do not, except so far as it may involve myself as one of the attorneys.

Q. If the charges are that the defense suppressed evidence without your knowledge, or withheld witnesses without your knowledge, or prevented a fair and impartial trial, without your knowledge, you do not claim to deny that that might be true? A. Not at all.

Q. Do I understand you to say that a man who has been a gambler and conducted a gambling-house, but who has since been a business man, will stand on the same plane as a witness in these courts with a man whose record has been unimpeachable?

A. That is a hard question to answer. It would depend a great deal upon the situation and who the witness might happen to be. Some preachers are not men of good moral character.

Q. Take the average.

A. If a man has never had any moral blemishes upon his life it is better.

Q. A good sound apple is better than a specked apple, is it not?

A. Yes, sir; but I do not want to be misconstrued. Men are not apples. You cannot apply a figure of speech

so, because a man has sinned once or a great deal, he has got to be specked. I have not got that opinion of men. David was one of the worst adulterers that ever lived, and yet afterwards he was a man after God's own heart.

Q. Now, if Talbott had been administrator for some years and had properly conducted the affairs of the estate, and after giving these numerous bonds his compensation was fixed by the Court at some $50,000, and the estate with the bank stock added panned out some two or three million—now, if a million were added to the estate, taking that same ratio, he might have gotten probably twelve or thirteen or fifteen thousand dollars more on that same ratio? A. Possibly.

Q. Fifteen thousand dollars is not a very large sum of money in this country, is it?

A. That depends; it is a good deal with some people. It is heeded more now than it was a few years ago.

Q. If Mr. Talbott had the possibility of making $15,-000.00 more compensation if he won a million dollars for the estate, and assuming that he might have the promise of possibly $100,000.00 if he lost, his advantage would be clearly in losing?

A. Well, of course, on that hypothesis, if it is true; but I do not know that it is.

Q. So, then, if pecuniary interests are to be conserved, on one side is $15,000.00 and on the other side is the vice-presidency of a bank and shares of stock as a gift, and a position in the community as a banker, a man might err?

Counsel for the defendants object to this question, upon the ground that it is assuming facts that are not

proven in the case, and which counsel has no right to assume in asking the question of the witness.

A. If a man is out for the money, of course he will take the largest sum that is offered; that is my idea.

Q. You know, at the time of the bank trial Mr. Talbott was quite close to Mr. Andrew J. Davis, Jr.?

A. I have always understood that; yes, sir.

Q. He was Andrew J. Davis, Jr's, vade mecum to a certain extent, confessor and friend?

A. I do not know that he was a close friend of the defendant Davis, although I always understood—

Q. It would have been a very great strain on a man to have turned aside all these aspirations of the future, and deprived his friend of the bank stock?

A. That depends on the strength of character that a man has. Some men can do that, some cannot.

Q. At all events, every bit of his aspirations—his interests, as we deem interests, at least, were rather with Andrew J. Davis, Jr.'s, success than with his success as administrator?

A. I do not know how to answer that question. There are a few remarks I want to make before closing. When I mentioned the names of the members of the Supreme Court, and said I did not believe they would do that, I do not want to be understood that there ever was a Supreme Court in this State that would do it, for I do not believe there has been. A man gets pretty low that will do a thing of that sort. A matter I wanted to do when I was asked the general question upon the close of my examination in chief. Mr. Boyce stated in his testimony that there was a copy of that written statement of

guarantee, and that I tore it up that time we were consulting here. I want to state that that is not true; he is mistaken about it. I do not remember of ever seeing a copy, and I know he is wrong about it.

Q. You do not know but what Darnold gave Boyce a copy?

A. I do not pretend to say he did not, but I know I did not tear it up.

Q. Taking up the question of the judiciary. My question was simply prompted by what was brought out by counsel for defendants in their examination of you, but you have in history heard, have you not, that the great lawyer and Judge Lord Bacon erred from pecuniary motives and fell?

Counsel for defendants object to this question as being irrelevant and immaterial, Lord Bacon not being a party to this suit, or connected with any conspiracy or combination in this case, it being irrelevant what Lord Bacon might have done or said.

Q. However, there was such an unfortunate piece of history connected with the judiciary, which apparently you might have overlooked in making your statement that there never has been a Supreme Court in this State that would have done anything of that character.

A. Still, I do not think there has.

Q. I do not know that there has been any such charge made, but you were asked as to whether or not you had heard such a rumor, and I believe you refused to answer.

A. That is a different thing. People are reckless here in what they say about one another.

Subscribed and sworn to before me this —— day of ————, 1898.

Special Examiner.

Tuesday, August 9th, 1898.

Counsel for the respective parties present as before, and hearing continued.

Counsel for the defendants offer in evidence a copy of certain proceedings in the court in which this action is pending, relating to the convening of the term of said court, commencing on the 11th day of July, 1898, and the adjournment thereof on the 23d day of July, 1898, duly certified by the clerk of said court, and the same is introduced in evidence and marked Defendants' Exhibit, United States Court Proceedings. C. W. B., Special Examiner."

Counsel for complainant objects to the offer so far as it covers the order designating Judge De Haven to hold a term of court on July 11th, 1898, on the ground that it is immaterial, as that matter is already spread upon the minutes of the court, and objects to the offer so far as it relates to the appointment of a bailiff. as irrelevant and immaterial, objects to the offer so far as it concerns the Butte and Boston Consolidated Mining Company against John F. Forbis, on the ground that it is immaterial and irrelevant, but he makes no objection to the order fixing the time for taking testimony in this case; objects to the offer so far as it relates to the adjournment of court, as wholly immaterial.

JAMES W. FORBIS, a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination.

(By Mr. DIXON.)

Q. Where do you reside? A. Butte City.

Q. What is your business?

A. Attorney at law.

Q. How long have you been engaged in that business?

A. Since 1885.

Q. In Montana?

A. In Butte—in Montana, yes, sir.

Q. Were you one of the firm of Forbis & Forbis, composed of yourself and John F. Forbis? A. I was.

Q. Were you a member of that firm in 1890 and 1891, and afterwards? A. Yes, from 1889 until 1895.

Q. Did you know John A. Davis in his lifetime?

A. I did.

Q. Do you know of a certain contract in writing made about the year 1891 between the firm of Forbis & Forbis, M. Kirkpatrick and W. W. Dixon on the one part and John A. Davis of the other part, relating to the litigation over the estate of Andrew J. Davis, deceased, and to compensation of attorneys for John A. Davis?

A. Yes, I know of such a contract.

Q. I will ask you to look at the paper which I show you and state if that is the original contract, if you know it was made.

A. Yes, sir; that is the original contract with an addition to it. I know the signatures of all the parties.

Q. Do you recognize your own—Forbis & Forbis?

A. Yes, sir; that was signed by my brother. I recog-

nize the signatures of W. W. Dixon and M. Kirkpatrick, and also of John A. Davis.

Q. Do you recognize the signature of John A. Davis?

A. I am quite familiar with it.

(Contract introduced in evidence and marked Defendant's Exhibit. C. W. B., Special Examiner.)

Counsel for complainant would like to cross-examine the witness as to his knowledge of the signatures:

Q. Were you present when this paper was executed?

A. I was present when John A. Davis executed it, but I did not see Mr. Kirkpatrick or Judge Dixon execute it.

Q. You have no recollection of it, aside from what is shown in the matter, in the paper?

A. Only from that.

Q. You have seen Mr. Dixon write? A. Yes, sir.

Q. Have received letters from him? A. Yes, sir.

Q. You say you know his signature? A. Yes, sir.

Q. You have seen Mr. Kirkpatrick write?

A. I have.

Q. Have you received letters from him?

A. Don't think so.

Q. Have you seen him write his signature?

A. I have.

Q. More than once? A. Yes; more than once.

Q. So that you are quite sure you are familiar with his handwriting? A. Oh, yes.

Q. Have you seen John A. Davis write?

A. Quite frequently.

Q. Have you seen him write his signature?

A. Yes, sir; I have drawn a great many papers for him and have seen him sign them.

Q. Seen him write his name to them?

A. I saw him sign them in person.

Q. Were the signatures of the lawyers affixed to this paper when John A. Davis signed?

A. No. John A. Davis signed first, and my brother signed for Forbis and Forbis; Mr. Dixon and Mr. Kirkpatrick signed later on.

Q. The signatures of John A. Davis and Forbis & Forbis were affixed in your office at the same time?

A. Yes, sir.

Q. Will you look at this paper and say if the signature of John A. Davis is in entirely different ink from the signature of Forbis & Forbis? A. Yes, sir.

Q. How do you account for that?

A. Mr. Forbis had a desk of his own, and Mr. John A. Davis signed that on my desk.

Q. You notice that the signature of Mr. Davis is different both on the end of the contract and on the addenda? A. I have noticed that.

Q. Just look at the addenda and say if the ink is apparently the same. A. I should say it is the same.

Q. The signatures of the lawyers is different?

A. I do not know how to account for it, unless Mr. Forbis had different ink on his desk.

Q. Was this second paper called the addendum signed at the same time? A. Yes, sir; at the same time.

Q. And at the same place?

A. Yes, sir; while he was sitting in the chair he signed both of them.

Counsel for complainant objects to the paper as immaterial and irrelevant.

Defendants offer it in evidence and ask leave to substitute a copy for it, the same to be introduced in evidence as heretofore noted.

Direct Examination by Mr. DIXON (Continued).

Q. Mr. Forbis, state if you know whether or not the firm of Forbis & Forbis or M. Kirkpatrick and W. W. Dixon acted in anywise as attorneys for Mr. James A. Talbott, as special administrator of the Estate of Andrew J. Davis, deceased.

A. They did. The attorneys you name represented Mr. Talbott; they were attorneys for Mr. Talbott, as special administrator.

Q. State if you know whether or not, in their employment as attorneys for Mr. Talbott, it was or was not understood with him that they could not and would not act as his attorneys in any matter relating to the bank stock case.

Counsel for complainant objects to this question as immaterial and irrelevant, and not in support of any defense in the case or any issues raised by the plaintiff, and as being hearsay, in that it is with respect to matters or agreements not communicated to the plaintiff or made in her presence, and it does not appear whether or not such agreements were in writing, and if in writing they should be produced.

A. That was the understanding at the time, that Mr. Dixon and Judge Kirkpatrick and our firm were employed by Mr. Talbott that we first represented Mr. Davis in his claim to the bank stock, and it was with that understanding we were employed. The thing was talked about and there was some talk about duplicating the con-

tract of John A. Davis with James A. Talbott in that suit as special administrator, but we did not consider a contract necessary and let it go as a verbal agreement.

Q. So there was no contract or agreement?

A. Not at all; there was one discussed, but never was signed.

Q. But there was an understanding?

A. Yes, sir.

Q. During all the employment of Mr. Talbott?

A. During the entire time we represented Mr. Talbott as special administrator.

Q. State if you know whether or not there was any understanding—I will ask you first if the firms of Forbis & Forbis and Dixon were employed in certain matters also for John H. Leyson, administrator of the will annexed of the estate of Andrew J. Davis, deceased?

A. Yes, sir; the same attorneys were employed by Mr. Leyson, as administrator of the will annexed?

Q. What, if any, was the understanding with Mr. Leyson with regard to their employment for John A. Davis, in having the preference to any employment for him as administrator?

Counsel for complainant makes the same objection to this question as to the previous question of a similar character.

A. The agreement was exactly the same as we had with John A. Davis and James A. Talbott, that we represented Andrew J. Davis first, that our employment by Mr. Davis was superior to that of either Mr. Leyson or Mr. Talbott and Mr. John A. Davis.

Q. State if you know whether or not the agreement

in this respect with Mr. Talbott and also with Mr. Leyson was carried out.

A. It was, to my knowledge, carried out strictly.

Q. State if you know whether or not the attorneys mentioned above had anything to do with Mr. Talbott or Mr. Leyson in matters relating to or the attorneys in the bank stock case?

A. No, sir; not directly or indirectly.

Cross-Examination.

(By Mr. DEMOND.)

Q. In the present suit of Mrs. Wood, in which testimony is being taken, you are one of the attorneys for Andrew J. Davis, Jr., and the First National Bank of Butte, the defendants? A. Yes, sir.

Q. And John Forbis, your brother, is another of the attorneys for these defendants? A. Yes, sir.

Q. And Mr. Dixon is your co-counsel in the matter with these defendants? A. Yes, sir.

Q. And those gentlemen mentioned are the same gentlemen concerning whom you have testified in your direct examination?

A. The same except Mr. Kirkpatrick, who has died since that contract was signed. He drew the brief in the Supreme Court of Montana, took the most active part in the preparation of it, but died before it was tried.

Q. You say the firm of Forbis & Forbis existed until 1895? A. Yes, sir; 1895.

Q. Since that time you have been practicing for yourself?

A. Well, yes; in all new matters, in all business we had on hand before, we are still partners in, until it is wound up.

Q. So far as the former business of the firm is concerned, you and your brother are still partners?

A. There has been no change.

Q. You knew John A. Davis in his lifetime?

A. Yes, sir.

Q. Who was he?

A. He was a brother of Andrew J. Davis, deceased, and the father of Andrew J. Davis, Jr.

Q. Andrew J. Davis, one of the defendants in this suit? A. Yes, sir.

Q. How long have you known John A. Davis?

A. Well, I won't say. I knew him for some years before his brother died. I won't say when I first met him; about the middle of the eighties, I think—'85 or '86, but I am not sure.

Q. You remember the time when Andrew J. Davis, deceased, died, the 11th of March, 1890?

A. Yes, sir.

Q. Do you recollect an application for letters of administration by John A. Davis? A. Yes, sir.

Q. Who were the attorneys representing John A. Davis in his application for letters of administration?

A. I think the same attorneys. I think it was Judge Dixon, M. Kirkpatrick, and our firm.

Q. Forbis & Forbis? A. Yes, sir.

Q. Who were the attorneys representing the contestants, Root and others?

A. It was Warren Toole, John B. Clayberg and Na-

thaniel Meyers of New York. I do not recall any others; there may have been others.

Q. McConnell, Clayberg & Gunn represented Root?

A. I do not know the firm name at that time. Mr. Clayberg took the principal part; the firm has been changed since.

Q. Well, do you recollect that subsequently there was an application for the probate of the will of Andrew J. Davis, deceased? A. Yes, sir.

Q. Who was the applicant?

A. John A. Davis was proponent.

Q. Who were the attorneys representing John A. Davis?

A. I think the same parties who signed that contract.

Q. Were there not some others?

A. Well, at the trial of the case there were; yes, sir.

Q. But originally you think Mr. Dixon and Forbis & Forbis represented the proponent?

A. And Mr. Kirkpatrick.

Q. There was a contest, was there not, over that will?

A. Yes, sir.

Q. Tried in 1891? A. Yes, sir.

Q. During the trial of the case did Judge Dixon and your firm represent the proponent still? A. Yes, sir.

Q. What other counsel?

A. I recall Wilber F. Sanders; I think that is all.

Q. Wilber F. Sanders of Helena?

A. Yes, sir; in addition to those named.

Q. You mean Colonel Sanders?

A. Yes, sir. Mr. Woolworth of Omaha, he did not represent—he was in the case and assisted in the trial

of the case, but I always understood he represented Erwin Davis.

Q. This Mr. Sanders you speak of—Wilber F. Sanders—was an attorney of Helena? A. Yes, sir.

Q. Is he the same Sanders who subsequently represented Talbott as administrator and as plaintiff to recover the bank stock? A. He is.

Q. Who were the attorneys representing the contestants in the will contest? A. In the trial of it?

Q. Yes.

A. Well, G. W. Stapleton, McConnell & Clayberg, and perhaps Mr. Gunn; I do not know; Nathaniel Meyers, Robert G. Ingersoll, Corbett & Wellcome, and—I cannot recall any others—oh, E. W. Toole.

Q. This McConnell you speak of is the same gentleman who has testified in the present case?

A. Yes, sir; the same gentleman.

Q. Well, there were various other contests and litigations in connection with the estate that went to the Supreme Court of Montana? A. Yes.

Q. And, generally speaking, the firm of Forbis & Forbis and Mr. Dixon represented the proponent?

A. Yes, while he was proponent we did.

Q. After that your firm represented Mr. John E. Davis as administrator who was substituted as proponent? A. Yes.

Q. Substantially the same gentleman; that Messrs. McConnell, Clayberg & Toole represented the Root faction throughout? A. Yes, sir.

Q. Now, in the trial of the bank suit, so-called, I understand that Mr. Dixon and your firm represented the

First National Bank and Andrew J. Davis, Jr., the defendant in that suit? A. Yes, sir.

Q. And the counsel for Mr. Talbott, as administrator, I understand, were Mr. Toole and his firm, McConnell, Clayberg & Gunn, and Mr. Sanders of Helena?

A. Yes, sir.

Q. And in the trial after the alleged will was propounded by John A. Davis, was Mr. Talbott appointed special administrator?

A. Yes, sir; as soon as the contests were filed?

Q. A large bond was referred to; do you know the size of that bond—was it two million or three million?

A. I do not know. I had the impression it was four or five.

Q. One of the sureties on it was Andrew J. Davis, Jr.? A. I do not know.

Q. After Mr. Talbott was appointed your firm and Mr. Dixon represented him in all matters pertaining to the estate, except the bank stock suit?

A. Yes, sir.

Q. This contract that you have put in evidence—it has been marked "Defendant's Exhibit, John A. Davis Contract," is dated apparently the 30th day of March, 1891; the will had been propounded by John A. Davis before this was signed?

A. It seems to me that will was propounded in July, 1890.

Q. John A. Davis was proponent of that will, and under the will would have obtained the whole estate if it was probated, with the exception of some small legacies?

A. Yes.

Q. The estate, then, was estimated at about three to four million dollars?

A. Well, sir, by people that did not know much about it. I have heard people say it was worth three or four million more.

Q. And the bank stock in dispute was worth about a million? A. That was about the general idea.

Q. How comes it that this contract was made whereby you gave up a client who had the possibility of recovering three or four million in the interest of a client who had the possibility of recoverng only a mlllion?

A. Because we were first obligated to Mr. Davis, Jr., first employed by him.

Q. When was the matter of your employment by him first discussed?

A. It was not a very long time after the Judge's death, but I do not know, I—

Q. Was it before or after Mr. Andrew J. Davis, Jr., testified in the administration proceedings which took place, I think, in April, 1890?

A. Well, sir, I could not answer that. Judge Davis died in March, '90, didn't he?

Q. Yes.

A. It was shortly after his death Mr. Davis employed us but I would not tell you whether it was before or after that proceeding.

Q. You say you would not? A. I could not.

Q. Was the employment by Andrew J. Davis, Jr., before the will was discovered or probated?

A. Oh, I think so; yes, sir. I am sure of that That employment, Mr. Demond, consisted of consultations

with an agreement as to fees, stating our case, getting our opinion on it, that was employment.

Q. How does it come that the actual contract of employment was such a considerable period of time after the oral employment?

A. Well, that was more neglect than anything else. The terms of that thing had been agreed upon long before it was signed.

Q. John A. Davis was the father of Andrew J. Davis?

A. Yes, sir.

Q. They were both members of the same family, were they not? A. Father and son, undoubtedly.

Q. What was their interests that made any difference between them so that it was necessary to have different counsel?

A. There was no such feeling; just the reverse. They were both willing to accept the same counsel.

Q. Do you not here, in this agreement of March 30th, first agree to act for Andrew J. Davis, to the exclusion of John A. entirely, so far as the bank is concerned?

A. We had agreed to that before Mr. Davis ever employed us.

Q. Why did you agree to do that if there was no hostility or diversity of opinion?

A. In case any question should arise about the bank stock we could not represent both sides of the case; we had to stay by the employment.

Q. At the time this contract was signed there was no contest or controversy in administration; it was simply a question of the will?

A. Just shortly after Judge Davis' death there was a contest about the administration.

Q. On the 30th day of March, 1891, when this contract was signed, the question was not about the administration—it was simply a question of whether or not there was a will? A. I guess you are right.

Q. So there was no question of administration?

A. Not at that time.

Q. If John A. Davis had succeeded in probating the will, you say there was no diversity of opinion between him and his son; how would the fact that his son claimed the bank stock make it necessary to have different attorneys?

A. I think it was generally agreed between John A. and Andy that that stock was Andy's. I never heard any dispute as between those two.

Q. Therefore, if the will was probated and John A. Davis was to get substantially the whole estate, there was no hostility between him and his son as he conceded his son's rights; what the necessity of having different attorneys? A. They had the same attorneys.

Q. Does not this contract provide that so far as the bank was concerned, you should be retained by Andrew J. Davis, Jr., to that extent? A. Yes, sir.

Q. What was the necessity of having different attorneys—that is, John A. dispensing with your services, as though there was some hostility?

A. I cannot answer that, except that we could not take both sides of the case in case there should be one. I can say in any litigation of ours between Andy and the heirs, the Davis legatees that we then understood we were engaged to Mr. Davis, we did not see that there would one arise, but we retained that liberty; at the time we could not foresee what was going to happen.

Q. This statement says—it is dated the 30th day of March, and is signed by John A. Davis—this contract reads as follows: "Whereas, the first parties herein have been up to the present time, retained by the said John A. Davis as his attorneys, and have acted as such, and propose to continue to act as such in the future." Are you not mistaken—is it not true that up to the 30th day of March, 1891, Mr. Dixon, Mr. Kirkpatrick and Forbis & Forbis had acted as attorneys for John A. Davis exclusively?

A. We had acted as his attorneys; yes, sir.

Q. How can it be that previously you had been retained exclusively by Andrew J. Davis?

A. That is the very purpose of that addenda to the contract, for the purpose of correcting that.

Q. The main contract, however, states that?

A. You have to read the contract all together to show the idea of it.

Q. Did not John A. Davis express a desire to have your services so that he could recover the bank stock if he got the estate?

A. No, sir. John A. Davis always well understood that our services belonged to Andy in such an event.

Q. Now, then, as to Mr. Talbott. You say there was a similar understanding with him; you say that you lawyers could represent him in everything excepting so far as the bank stock was concerned? A. Yes, sir.

Q. The idea was so that it would not appear to have lawyers working for the probate of the will on one hand, and necessarily endeavoring to increase the estate and at the same time representing a man who claimed the stock which would diminish the estate?

A. There was no such idea.

Q. Should there not have been such an idea?

A. No, sir.

Q. Why not?

A. We felt that the attorneys could do justice to the estate and to Andrew J. Davis, Jr., until the contest arose, and then we had been previously employed.

Q. The idea is this, is it—it would be proper for the gentleman representing the proponent of the will, and the special administrator and at the same time represent a man claiming the assets of the estate for his own personal use?

A. It was never considered assets of the estate.

Q. Property, however, which might be claimed as assets? A. That was the idea.

Q. If that was the case, you could not of course, in the bank suit, represent Talbott as administrator?

A. No, sir.

Q. Neither you nor Mr. Dixon or your brother?

A. No, sir.

Q. How comes it, then, that Colonel Sanders, who did represent the proponent of the will, was retained by Talbott as one of his counsel?

A. I do not know anything about that.

Q. He was about in the same situation as Forbis & Forbis and Judge Dixon?

A. I do not know anything about it.

Q. I mean to say if there were objections to you and your brother and Mr. Dixon working for Talbott as administrator there were the same objections to his doing so?

A. It was not a question of objection; it was a question of agreement.

Q. At all events, it is true that Colonel Sanders was one of the counsel of the proponent of the will?

A. Yes, sir.

Q. It is true that he was one of the counsel for Talbott as administrator? A. Yes, sir.

Q. While you were counsel for Mr. Talbott from the time of his appointment up to the beginning of the bank suit in December, 1893, what generally did you and Mr. Dixon and your brother do for Talbott as administrator?

A. Well, Judge Davis owned considerable mining property and some of it had little clouds on the title. Then there was the last annual account to be made up, inventories to be made, matters mostly of a formal character—very little litigation.

Q. That kind of employment continued as long as Talbott was administrator?

A. Yes, sir; continued when Mr. Leyson took his place.

Q. But so far as any matters were concerned in which Talbott was suing or endeavoring to get the bank stock, in that case you let his own attorneys advise him?

A. We had nothing to do with that at all.

Q. In the litigation about the First National Bank, when you consulted Mr. Talbott or he consulted you about the estate, how could you support Mr. Talbott as to his two personages, one his personality as administrator and one his personality as a witness for Andrew J. Davis, Jr., in the bank suit— would not his knowledge in one capacity be his knowledge in the other?

A. Yes; but they were two different people, as I considered them.

Q. Didn't he, as administrator have certain knowledge which he necessarily possessed as an individual?

A. Yes.

Q. Didn't he have knowledge as an individual about Andrew J. Davis, Jr., the defendant and claimant of the bank stock, which he carried with him in his capacity as administrator?

A. Yes, of course, but the administrator did not necessarily know what Talbott knew as administrator, but as a matter of course, being the same person, he did know it

Q. So that really as a matter of course, being associated with Mr. Andrew J. Davis, Jr., to sustain his claim to the bank, and being his chief witness, he must have known something about the proposed method of procedure that Andrew J. Davis, Jr., was to carry on to get the stock.

A. If he did, he did not get it from us. We never talked with him about it. We knew what he was going to testify.

Q. But whatever knowledge he had as to modes and means, if he had such knowledge, he necessarily had it in his other capacity as administrator?

A. Not as to modes and means. As to facts I will agree.

Q. You talk of having a written contract with Mr. Talbott of the same general character as that which was made with John A. Davis?

A. Yes; that was discussed. I remember distinctly that we considered a written contract might or might not be reviewed by the Court in so making it.

Q. You are aware, are you not, that it is the duty of the special administrator, being a kind of collector, to reduce all the assets of the estate to a cash basis?

A. Yes, sir; that is his duty.

Q. You, Mr. Dixon and your brother were the attorneys for the administrator Talbott and advised him as to his duty? A. Except as to the bank stock.

Q. Did you advise him it was his duty to admit the gift of the bank stock? A. No, sir, we did not.

Q. Being general attorneys for the administrator, was it not part of your duties, if you remained as attorneys at all, to prosecute for him the bank stock case?

A. No, sir; it was not part of our duties.

Q. How is it possible for an attorney to be an attorney for the executor and administrator of the estate as to everything except one thing?

A. Very easy; I see no difficulty, if an estate owns several pieces of property, real and personal, an attorney can say I cannot represent you as to this particular piece, but as to all the rest of it I can.

Q. Knowing that it is the duty of an administrator to collect all possible knowledge which might come to him, and all facts that might win that bank suit, do you think it was not your duty to so inform Mr. Talbott as administrator?

A. It was not our duty to give any information to Mr. Talbott, even if we had known.

Q. How could you continue to be general attorneys for the administrator under these circumstances?

A. Everything except as to the bank stock case and to have given him all the facts in our possession as to any other property.

Q. Was it not Mr. Talbott's duty as administrator to collect that bank stock into an asset?

A. It was his duty to try to see whether it was an asset or not.

Q. Do you know how it is that Mr. Talbott did not bring that suit until the Court ordered him to?

Assuming that the Court ordered him, of which there is no evidence whatever, defendants' counsel object generally to any assumption or any statement of what the evidence is by the complainant's counsel in putting his question, counsel for defendants' stating that there is no evidence whatever that Mr. Talbott was directed by the Court to bring suit in relation to the bank stock.

Counsel for complainant states that the proof is dependent, first, upon the admissions in the pleadings; second, upon the evidence adduced by. The bill of complaint alleges that Mr. Talbott was directed in the year 1893 to bring suit and in the answer it is admitted; therefore, it is admitted in this case, and that therefore counsel is not assuming facts not proven.

A. I never had any reason to inquire why Mr. Talbott did not bring the suit. It was not of our concern, and the first time I ever heard the reason given was by Judge Toole on the witness stand.

Q. That Mr. Dixon had written to Judge Toole, suggesting to Judge Toole that suit ought to be brought to settle the question?

A. I believe he said he delayed it on account of inability to find the evidence.

Q. You recollect there was an order of the Court that this suit be brought; was the suit so brought?

A. I believe there was an order; as soon as the Court order was made the suit was brought.

Q. I believe you represented Andrew J. Davis, Jr., all through in this bank stock litigation?

A. Yes, sir.

Q. That is equally true of your brother and Mr. Dixon? A. Yes, sir.

Q. And that included the trial and the appeal to the Supreme Court of Montana? A. Yes, sir.

Q. One of your clients was the first National Bank of Butte?

A. Yes, sir; had been for a long time.

Q. And one of the clients of your brother and Judge Dixon in this bank stock litigation?

A. Yes, sir.

Q. Mr. Talbott, I think, at the time was a director in the bank at Judge Davis' death, was he not?

A. I do not recollect. I do not know. I know he has been a director for some time, but whether he was at that time, I do not remember.

Q. Was there any consistency in your representing both A. J. Davis and the bank? A. No, sir.

Q. Has it been your experience that where a man claims stock in a national bank, and the question is raised between that owner and a third party that the bank often resists the claim and refuses it to the claimant, calling for proof?

A. Yes, sir; very frequently, in this case the bank did not resist.

Q. Was not affirmative evidence put in on behalf of the bank?

A. No, sir, not at all; the bank filed an answer stating that they had no interest—let the Court decide.

Q. In behalf of any evidence on the part of the bank, is it not true that the judgment would need to be final?

A. Practically.

Q. Was there not a duty imposed upon the bank to take some steps in this litigation?

A. Not at all. The matters did not affect the bank; the bank directors did not care who owned the stock in this particular.

Q. Who retained you for the First National Bank in this litigation?

A. Judge Dixon and John F. Forbis had been retained by the bank a long time before the judge died. I simply got into it by being a partner of John's. Judge Davis formerly employed these gentlemen.

Q. I believe it has been testified by A. J. Davis that Judge Dixon that Judge Dixon was retained somewhere in 1891 or 1892; that is my recollection. Will you tell me if you know by whom the employment of Judge Dixon and your brother was continued in the years 1893 and 1894 during the bank trial? A. I cannot answer that.

Q. What persons connected with the First National Bank did you consult as your client, representing the bank?

A. Well, Andrew J. Davis, of course, was the cashier there, and had been not only subsequently to the trial, but before his uncle's death the moving spirit in that bank. We usually would consult him when we wanted

any information about a lawsuit, or facts in connection with it. It would depend upon what you wanted to find out, who you would consult.

Q. At the time of the bank trial Judge Knowles was president?

A. He was president after the Judge died.

Q. Did he authorize the appointment of yourself and associates? A. I could not say so personally.

Q. Mr. James A. Talbott was vice-president of the bank, was he not, in the year 1894?

A. I believe so.

Q. As vice-president of the bank he was authorized to control you and your contract on your suit for the First National Bank? A. I do not know that he was.

Q. As an officer of the bank he was in a position of apparent authority?

A. He was subject to the control of the board of directors.

Q. Is it not ordinarily true that the officers are the delegated agents of the bank for the purposes of the prosecution of business?

A. No one director has that power.

Q. Is it not true that there are standing rules which give to the officers of banks fixed and definite powers in regard to the business of the bank?

Counsel for defendants object to this question as irrelevant and immaterial and as calling for the opinion of the witness upon a matter of which he has not shown he has any knowledge.

Q. There is in evidence in this case, Mr. Forbis, the by-laws of the First National Bank of Butte; you are acquainted with them, are you not?

A. I have read them; yes.

Q. I will ask you if it is not a fact that certain powers are—

Counsel for defendants object to the question on the ground that the by-laws are in evidence and that they themselves are the best evidence of the powers of the officers and directors.

A. I will not answer that question unless you let me see the by-laws.

Q. You know, as a matter of fact, that the officers had certain powers delegated to them by the by-laws?

A. At what time?

Q. In 1894 to 1896.

A. I had to, after I became a director.

Q. When did you become a director?

A. Well, sir, I do not know whether it was in 1893 or 1894. It was earlier than that.

Q. Earlier than 1893?

A. Yes.

Q. You became a director, did you not, by the transfer to you of ten shares of stock by Judge Dixon?

A. No, I think not. I do not think I got a transfer from Judge Dixon. My stock came direct from the officers of the bank—the president and secretary. I never got Judge Dixon's stock.

Q. The president and secretary ordinarily sign certificates or transfer the stock. Does the person who transfers own the shares?

A. If I got his stock I got it from the bank.

Q. You succeeded to the same ten shares that Judge Dixon transferred?

A. I do not know that it was the same ten shares.

Q. If you got any stock it must have been by reason of the transfer of other shares to you?

A. They gave me ten shares of stock in the bank; where they got it I do not know.

Q. Don't you know from talks with Mr. Dixon and investigation that it was Mr. Dixon's stock?

A. I know I succeeded Mr. Dixon on the board.

Q. You are aware, are you not, that there were certain shares of stock at the time of Judge Davis' death standing nominally in the names of certain directors, but which Mr. Talbott in his account claimed belonged to the estate? You are aware of that fact, are you not?

A. Why, I have not seen Mr. Talbott's account. You told me that; I guess it is correct.

Q. So far as the stock which you carry in the bank in the way that you describe, you make any personal claim to it as an owner?

A. That stock issued to me?

Q. Yes. A. Yes, sir.

Q. You claim to own it?

A. I claim to own it until certain conditions are fulfilled.

Q. Will you state those conditions?

A. Yes, sir; I gave my note for it.

Q. Was there any agreement whereby upon the surrender of the note the stock was to go back to the bank?

A. Yes, sir.

Q. Do you know whether or not Judge Dixon gave a note for the stock he held under a similar agreement?

A. I do not know under what agreement he held his stock.

Q. If it be true, Mr. Forbis, that Judge Dixon held ten shares of stock in that bank under an agreement with A. J. Davis, whereby on surrender of his note the stock should belong to A. J. Davis, and if it be true that Mr. Dixon got back his note and surrendered his stock, and if it be true that you got that stock, do you mean to say that you can claim it? A. Yes, sir.

Q. It would be your idea that Judge Dixon was still liable?

A. I do not think that stock can be taken from me unless that note is surrendered. As a legal proposition, I do not think it can be surrendered.

Q. Is it your intention to hold that stock at all events?

A. I am going to hold it until I get that note back.

Q. As attorney for Mr. Talbott from the very beginning, as you stated, do you mean to say that you never knew at the time he filed his statement in 1891 that the fifty shares were claimed by the estate?

A. There has never been any question about that; that is a matter that has been conceded.

Q. If the ten shares you got are simply a reissue of those belonging to Judge Dixon, could those ten shares not be the stock of the estate?

A. As long as the estate has my obligation.

Q. With whom did you make the arrangement to get this ten shares of stock?

A. I was sent for one afternoon to attend a meeting of the directors of the First National Bank. Judge Knowles was there, James A. Talbott was there, and I am inclined to think that S. T. Hauser was. At all

events, Mr. Dixon had been elected to Congress; his place would be vacant and they decided there in that meeting to elect me to take Mr. Dixon's place.

Q. You did not pay any cash for that stock?

A. I did not; no, sir.

Q. You simply gave a note for it? A. Yes, sir.

Q. For what amount?

A. I believe it was for $2,500.00.

Q. You are attorney for Mr. Leyson, his attorney now, are you not? A. Yes, sir.

Q. Have you not been this summer informed of the claim of the estate to this fifty shares left by Judge Davis? A. I have.

Q. Do you know, as a matter of fact, since Judge Davis' death a stock dividend was declared dollar for dollar, and that these fifty shares now represent 100?

A. Yes, sir.

Q. Have you advised Mr. Leyson in the interest of the estate to reduce that 100 shares in his possession?

A. Yes, sir.

Q. Has he done it? A. I think so.

Q. Then there are some dividends in the bank which are applicable to the particular shares I refer to?

A. I hardly think that there is. I think that dividend simply increased the number of shares.

Q. Has there not been a cash dividend since 1890?

A. I do not think so; I do not know of any.

Q. Didn't you prepare the last statement published the 26th of June of this year? A. I did not.

Q. Did you know about it?

A. I guess I signed it.

Q. Do you know that it states $11,000 unclaimed dividends? A. I do not.

Q. You would not state positively that there are no dividends that are applicable to these shares?

A. I would not say positively.

Q. You are still a director of the bank?

A. Yes, sir.

Q. Have you a place near town known as Thornton Springs?

A. Yes, sir; I have not got it—a corporation owns it.

Q. During this summer, during the taking of this testimony, you have from time to time been out there?

A. Yes, sir.

Q. Are you acquainted with Meyer Gansberger?

A. I am.

Q. Is he the Meyer Gansberger referred to in the affidavit on motion for a new trial?

A. Yes, sir; I think he is the same man.

Q. There is no more than one of that name?

A. I do not know of but one.

Q. He has been in town from time to time during the taking of this testimony? A. I think he has.

Q. Has he not on more than one occasion visited you at Thornton Springs?

Counsel for defendant objects to this question as immaterial and irrelevant and not responsive to any question brought out on examination in chief.

A. I have not seen Mr. Meyer Gansberger at Thornton Springs since the taking of this testimony or at any time before that.

Q. Was he not present at Thornton Springs about a month ago, on Sunday, drove out there, and sat with you near the plunge?

A. I did not see him there. He has not been there since the plunge was completed.

Q. When was the last time, Mr. Forbis, he was there with you at Thornton Springs?

A. I should say that the last time I saw Gansberger at Thornton Springs was six weeks or two months ago; probably two and a half months.

Q. Since I have been in Montana?

A. I think likely since you came, yes; oh, he has been coming to Thornton Springs for the last two years, off and on.

Q. You have seen him in Butte since I have come here? A. Yes, sir.

Q. When you saw him he was not ill or decrepid?

A. Not in the least; in very good health.

Q. Your side of the case have produced three letters purporting to have been written by Mr. Boyce; one to Mrs. Darnold and two of them to Mr. Darnold. You remember those letters, do you not?

A. I saw them in the courtroom when they were produced.

Q. From what source did you get those letters?

Counsel for complainant objects to this question as immaterial and irrelevant and not in response to anything called out on examination in chief of the witness.

Q. From what source were those letters procured Mr. Forbis? A. I decline to answer that.

Q. Will you please state, Mr. Forbis, for what reason you decline to answer.

A. Because that is a matter—as to the source of getting documents that attorneys should not be asked to testify to.

Q. You know W. E. Darnold? A. Yes.

Q. He was one of the witnesses in the bank stock case for the defendant and contestant?

A. Yes, sir.

Q. Do you know where he resides at present?

A. I do not.

Q. Were these letters procured from Mr. Darnold or from Mrs. Darnold?

Counsel for defendants objects to this question, upon the ground that it is immaterial and irrelevant, and not responsive to anything called out on examination in chief of the witness.

A. I do not know.

Q. Have you had any correspondence with Mr. Darnold within the last year?

(Same objecton by counsel for defendants.)

A. Never had any correspondence with Mr. Darnold in my life.

Q. Do you know whether Mr. A. J. Davis has had any correspondence with Mr Darnold during the last year.

(Same objecton by counsel for defendants.)

A. I do not know.

Q. Has Mr. A. J. Davis told you that he has had any correspondence with Mr. or Mrs. Darnold during the last year?

(Same objecton by counsel for defendants.)

A. I decline to answer that.

Q. Did you receive these letters from Mr. A. J. Davis, Jr.?

A. I do not recollect that I received them at all. I may be in error about that. I am not sure whether I did that or not. I think Mr. Dixon put these letters in evidence. I was not in the courtroom, if I am not mistaken, but I received these letters from the special examiner to make copies of them.

Q. Do you know how long they have been in the custody of the defendant, A. J. Davis, Jr.?

(Same objection by counsel for defendants.)

A. I do not.

Q. When did you first see them?

(Same objection by counsel for defendants.)

A. I saw them within a week before this hearing begun for the first time. I do not know whether it was two days or within a week.

(Same objection by counsel for defendants.)

Q. You are acquainted with most of the witnesses, are you not, who gave testimony for Andrew J. Davis, Jr., in the suit for the First National Bank stock?

(Same objection by counsel for defendants.)

A. Most of them; yes, sir.

Q. You say you have been a director of the bank since about 1893, you think?

A. My mind is not clear as to when I was elected the first time. I can only connect it with Mr. Dixon's election to Congress.

Q. Is it not a fact, Mr. Forbis, that at the time of the bank stock suit, several of the witnesses called by An-

drew J. Davis, Jr., in his own interest, were indebted to the First National Bank of Butte?

(Same objection by counsel for defendants.)

A. I have not the slightest idea.

Q. Have you not since learned, Mr. Forbis, that some of the gentlemen who were examined as such witnesses at the time were indebted to the First National Bank of Butte?

(Same objection by counsel for defendants.)

A. I have not. I do not know anything about the amount that anyone owes the First National Bank of Butte, except myself, and if I had I would not tell you.

Q. Since you have been a director of the bank, J. A. Talbott has been a director for a portion, if not all, of the time? A. I think so.

Q. Since 1894, I think, he has been vice-president?

A. I think so.

Q. What is Mr. Talbott's salary?

(Same objection by counsel for defendants.)

A. I decline to answer that.

Q. Upon what ground?

A. On the ground that it is a matter of the internal management of the bank and does not concern the issues in this case.

Q. Don't you think it has some bearing upon some of the issues in this case?

Counsel for defendants object to this question, upon the same grounds as stated above.

A. No, sir.

Q. Do you know whether or not any consideration in money was paid for the three letters written by Boyce

to Darnold which have been produced in evidence in this case?

(Same objection by counsel for defendants.)

A. I do not know anything about it.

Q. But you are unwilling to state your knowledge as to how these letters were procured?

(Same objection by counsel for defendants.)

A. I am unwilling to state information imparted to me by my client in a confidential way. I do not care whether it is knowledge of letters, or where they came from.

Q. Have you not noticed in the taking of testimony in this case that Judge Dixon and you have asked Judge McConnell and E. W. Toole with respect to instructions given by their client?

(Same objection by counsel for defendants, and as calling for a matter not a fact, but for the opinion of the witness, or observation of the witness.)

A. I have not heard Judge Dixon or anyone else ask anyone on the witness stand as to confidential communications from clients.

Q. Mr. Forbis, is it not true that in proving your side of the case you have asked Judge Toole and Judge McConnell questions with respect to instructions given them by James A Talbott, their client?

(Same objection by counsel for defendants, and also objected to on the ground that it is calling for the opinion of the witness and not for a fact; the evidence itself being the best proof, if there be any truth in it.)

A. I have heard no questions as to confidential communications; no, sir.

Q. Will you please answer the question?

A. Yes, sir.

Q. If it be true that you are willing to, at least so far as it helps your side of the case, to bring out matters of instructions from clients, why are you unwilling to disclose facts which may have come from your own client if they would damage your own side of the case?

A. Because it calls for an opinion, or the idea of the witness and not for a fact. I think that each attorney has to judge of his own wishes in the matter, and, while you assume in your question, if I would answer this question it might be damaging to my client's case, I would state that I could not answer every question you asked me.

Q. I am willing to assume that you will stop at that. Is not your client, Mr. Davis, present here, Mr. Andrew J. Davis, Jr.? A. Yes, sir.

Q Do you know whether or not any person representing Andrew J. Davis, Jr., procured these three letters of Mr. Darnold's which have been offered in evidence?

(Same objection by counsel for defendants.)

A. I do not know.

Q. You represented Mr. Davis, Andrew J. Davis, Jr., did you not, at the time of the motion for a new trial in the bank stock case?

A. Not actively; no, sir—that is to say, I was an attorney of record, being a member of the firm of Forbis & Forbis, but I took no part in the preparation for trial of that motion—no active part.

Q. You have since examined the record in the bank stock case? A. Casually; yes, sir.

Q. You remember the affidavit of James R. Boyce, Jr., put in by the plaintiff?

A. I became familiar with it on this hearing.

Q. Are you aware of the fact that no affidavit was filed for Andrew J. Davis, Jr., denying the statements of Mr. Boyce with respect to Darnold's trip with Meyer Ganzberger?

Counsel for defendants makes the same objection to this question, and as calling for a matter which the record itself, already in evidence in this case, is the best evidence.

A. I am not aware of that fact.

Q. You are aware of the fact that no such affidavit was filed by you after examining the bank record?

A. I am not aware of it.

Q. How thoroughly have you examined the bank record?

Counsel for defendants objects to the question, upon the same grounds as stated above, and also upon the ground that the record itself is the best evidence of what it contains.

A. That portion of the record I know very little about, the motion for a new trial.

Q. I will ask you once more, finally, whether on consideration you are willing to state what Mr. Talbott's salary is in the First National Bank of Butte?

Counsel for defendants makes the same objection to this question, as that stated above.

A. No; I am not willing, or the salary of anyone else draws a salary from the bank.

———————.

Subscribed and sworn to before me this —— day of ————, 1898.

————————,
Special Examiner.

Wednesday, August 10th, 1898.

Counsel for the respective parties present as before.

And thereupon no further testimony being offered on behalf of the defendants, counsel for complainant states that when he is ready he will bring up rebuttal upon five days' notice, within thirty days, and thereupon it was agreed that said counsel at such time could produce such witnesses as he desired to examine in rebuttal.

Minute-Book.

United States Circuit Court, Southern Division, District of Montana. February Term, A. D. 1898. Monday, the 11th day of July, A. D. 1898. 50th day of said Term.

10 A. M.

Court convened pursuant to adjournment. Present: Honorable JOHN J. DE HAVEN, United States District Judge for the Northern District of California.

In the Matter of Designating a District Judge to Hold Circuit Court for the District of Montana, Northern and Southern Divisions. }

Order Designating District Judge to hold Circuit Court.

Whereas, by accumulation of business in the Circuit Court of the United States of America, for the District of Montana, Northern and Southern Divisions, and be-

cause in my judgment the public interests so require, in pursuance of the Statutes of the United States of America in such cases made and provided, it is hereby ordered that the Honorable John J. De Haven, United States District Judge for the Northern District of California, be, and he is hereby, designated and appointed to hold Circuit Court of the United States of America in and for the District of Montana, Northern and Southern Divisions, for and during the February and April terms, respectively, thereof, either alone, in place of, or in conjunction with the United States Circuit or District Judges, or either of them, at Helena, or Butte, Montana.

Dated June 13th, 1898, at San Francisco, California.

W. W. MORROW,

United States Circuit Judge, Ninth Judicial Circuit.

In the Matter of the Appointment of a Bailiff.

Order Appointing Bailiff.

On the application of the United States Marshal, it is hereby ordered that Henry H. Guthrie be, and he is hereby, appointed bailiff of this court for this session of the February Term.

BUTTE AND BOSTON CONSOLIDATED MINING COMPANY
vs.
JOHN F. FORBIS et al.
} No. 47.

Order Setting Petition for Hearing.

Ordered that petition of Richard J. Watson, guardian, to intervene be, and the same is hereby, set for hearing Monday, July 18th, 1898.

HARRIET WOOD,
vs.
A. J. DAVIS et al. } No. 58.

Order Fixing Time to Take Testimony.

Ordered that defendants herein have thirty (30) days from this date for the taking of their testimony herein, and that the complainant have thirty (30) days from the conclusion of the taking of defendants' testimony, in which to take their testimony in rebuttal.

Minute-Book.

United States Circuit Court, Southern Division, District of Montana. February Term, A. D. 1898. Saturday, the 23d day of July, A. D. 1898. 59th day of said Term.

11 A. M.

Court convened pursuant to adjournment. Present: Hon. JOHN J. DE HAVEN, United States District Judge for the Northern District of California.

Court thereupon adjourned sine die.

JOHN J. DE HAVEN,
Judge.

GEO. W. SPROULE,
Clerk.

By Charles W. Blair,
Deputy Clerk.

United States of America,
District of Montana, } ss.
County of Silver Bow.

I, George W. Sproule, Clerk of the United States Circuit Court for the Ninth Circuit, District of Montana, do hereby certify that the foregoing is a full, true, and correct copy of the convening of the said court on the 11th day of July, A. D. 1898, and a portion of the proceedings had in said court on said day, and all of the proceedings had in the case of Harriet Wood against A. J. Davis et al. (No. 58), and also of the adjournment of the said court on the 23d day of July, 1898, as the same appears of record in the minutes of said court in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the said court, at Butte, Montana, this 9th day of August, in the year 1898.

[Seal] GEO. W. SPROULE,

Clerk.

By Charles W. Blair,

Deputy Clerk.

Memorandum of Agreement.

Memorandum of agreement, made and entered into by and between William W. Dixon, M. Kirkpatrick, and Forbis & Forbis, all of Butte City, Silver Bow county, State of Montana, of the first part, and John A. Davis, of the same place, of the second part, witnesseth:

That whereas, the said second party is an heir of Andrew J. Davis, deceased, and as such is entitled to share in the distribution of the said estate of the said Andrew J. Davis, deceased; and,

Whereas, there is now pending in the District Court of the Second Judicial District of the State of Montana, in and for Silver Bow county, Montana, a proceeding for the probate of a certain instrument purporting to be the will of Andrew J. Davis, deceased, and by the terms of which will the said John A. Davis is the principal devisee and legatee; and,

Whereas, the said will is being contested by divers parties and may hereafter be contested by other parties who claim an interest in the estate of Andrew J. Davis, deceased, and the validity of the said will is disputed; and,

Whereas, the first parties herein have been up to the present time, retained by the said John A. Davis as his attorneys, and have acted as such, and propose to continue to act as such in the future:

Now, therefore, this agreement witnesseth: That said first parties herein hereby undertake and agree, that they will devote their time and attention as attorneys, in the interest and on behalf of the said John A. Davis, in all matters arising out of the estate of Andrew J. Davis, deceased, until a final determination of all such litigation, and until the said estate shall be finally distributed to the parties entitled thereto. And that they will use their best efforts and endeavors for the interests of the said John A. Davis, in whatever capacity he may claim the said estate, or any interest or property therein, and all litigation between him and others in reference thereto.

In consideration whereof, the said John A. Davis has agreed, and does hereby agree, to pay to said first parties, for their services as aforesaid, the sum of seventy-five thousand dollars ($75,000.00). The said sum being pay-

able on the first distribution of money or property to said John A. Davis, in quantities sufficient to pay said sum. And the said John A. Davis further undertakes, promises, and agrees that if the said will shall be finally probated, or if the controversy concerning the same shall be finally compromised between him and the parties claiming adversely to the said will, and upon a final settlement thereof, in case of the probate of the said will, or in event of a compromise of the differences between said parties, he will pay to the said first parties, the further and additional sum of fifty thousand dollars ($50,000.00).

But it is distinctly understood and agreed that if the said will shall not be probated, and the claim of the said John A. Davis thereunder shall be defeated, and no compromise shall be made between the several claimants to the said estate, then the said first parties shall not receive the said additional sum of fifty thousand dollars, or any other sum over and above the said sum of seventy-five thousand dollars hereinbefore mentioned.

Witness, the hands and seals of said parties hereto, this the 30th day of March, 1891.

M. KIRKPATRICK. [Seal]
JOHN A. DAVIS. [Seal]
WILLIAM W. DIXON. [Seal]
FORBIS & FORBIS. [Seal]

Whereas, I, John A. Davis, on this 30th day of March, 1891, have entered into a contract with W. W. Dixon, M. Kirkpatrick, and Forbis & Forbis, attorneys, copy of which contract is hereto attached, this is to certify that the said W. W. Dixon, M. Kirkpatrick, and Forbis & For-

bis, attorneys, have, in making said contract, reserved the right to act as attorneys for my son, A. J. Davis, in any litigation that may arise in connection with his claim to be the owner of the stock of the First National Bank of Butte City, Montana; or that may arise in any other way concerning any interest he may have or claim to have in and to said stock; and I hereby agree that the said Dixon, Kirkpatrick, and Forbis & Forbis shall have the right to act as attorneys for the said A. J. Davis, in relation to any such litigation over his claim or interest above named, whether I may or may not be concerned adversely in any such litigation, claim, or interest.

Signed this 30th day of March, 1891.

JOHN A. DAVIS.

Proceedings Before Examiner.

Wednesday, August 24th, 1898.

Met pursuant to notice, counsel for the respective parties being present as before.

For the Complainant, Harriet Wood: C. M. Demond and C. P. Drennen,

For the Defendant, A. J. Davis: Forbis & Forbis and W. W. Dixon.

For the Defendant, J. E. Davis, as Admr. E. N. Harwood.

For the Defendant, J. A. Talbott: Wm. Scallon.

For the Defendant, J. H. Leyson: Wm. Scallon and J. W. Cotter.

And thereupon the following proceedings were had:

Defendants, before complainant opens her rebutting testimony, offer in evidence copy, certified by the clerk of

the Supreme Court of Montana, of the brief and argument of Toole & Wallace, attorneys for appellant in said court, in the case of James A. Talbott, as special administrator of the estate of Andrew J. Davis, deceased, complainant and appellant, versus Andrew J. Davis and the First National Bank of Butte, defendants and respondents. Defendants' counsel state that this copy should have been offered in evidence in connection with the testimony for defendants of E. W. Toole, but was overlooked at that time, and the defendants now offer said copy in evidence and ask that it be marked by the Examiner as one of defendants' exhibits.

(Left open to objection.)

(Paper introduced in evidence and marked "Defendants' Exhibit, Supreme Court Brief.")

Tuesday, August 30th, 1898, 2 o'clock P. M.

Met pursuant to notice, when the following proceedings were had:

And thereupon an affidavit and notice was introduced by the defendants.

Counsel for complainant objects to the filing of the affidavit, or to any proceedings pursuant to this affidavit or notice, upon the grounds that the court has already fixed the time for the taking of testimony by both parties; that the time for complainant to take testimony in rebuttal does not expire until the 9th of September, 1898, and that therefore any action on the part of the Examiner to take any testimony pursuant to this affidavit is directly contrary to the order of the Court and entirely outside of his jurisdiction, and wholly objectionable, and counsel

for complainant requests the Examiner to take no notice of this application, and to take no evidence whatever pursuant thereto in any event until some Judge has given power in the premises.

Counsel for defendants states that it is not claimed that the Examiner has the power to rule upon this matter, or to do otherwise than to take the testimony, leaving it to the Court to rule upon its admissibility as to whether it was taken in time, and does ask the Examiner at this time to make an order that five days is reasonable previous notice to be given to complainant's counsel of the taking of the above testimony.

Counsel for complainant asks the Examiner to take note that the sixty-seventh rule of equity provides for the taking of testimony in equity cases, and that three months is given therefor; that the Court may make an order for the apportioning of the time for taking testimony; that the Hon. Judge De Haven by order in this case has apportioned the time, and that the complainant's time does not expire until the 9th day of September, 1898, and that no further time for any party has been granted by the Court, and that this is the expiration of the three months' time granted by the Supreme Court of the United States in equity and the Supreme Court rules governing these cases; that the Examiner has no power whatsoever to take any testimony on behalf of the defendants without the further order of this Court. Complainant's counsel therefore asks the Examiner to refuse to make an order as prayed for by the defendants, either fixing the time, taking notice or granting leave for the defendants to take further evidence upon the ground that

it is wholly without his power, on the ground that it is without his power as established by the rules of this Court and the Supreme Court of the United States.

Counsel for defendants state that they are not asking the Examiner to make an order or ruling upon this matter, except that if the testimony is admissible and can be taken five days' notice is a reasonable notice to complainant.

Counsel for complainant objects to the Examiner making any ruling upon hypothetical conditions which do not exist.

(By the EXAMINER.) I think the records of the case will show that heretofore in this case five days' notice has been considered sufficient notice to the opposing counsel of the intention to take testimony. I have no power to make an order as to what is a reasonable notice to be given of the taking of testimony in this case after the expiration of the time for taking testimony. I am perfectly willing, however, to go on and take such testimony as the defendants' counsel desire to introduce at such time as they may state, but could not include such testimony in the record of the case, and if admitted at all that question would have to be left to the Court.

Counsel for defendants state that while they have filed this notice and affidavit, they do not ask the Examiner to pass in any way upon the relevancy of this testimony or upon the right of the defendants to introduce it, but only ask him to make an order that in case the testimony was admissible, five days was a reasonable notice to be given to the complainant of the time and place of taking the same, and in addition to this only ask the Examiner to

take said testimony in the same manner as the other testimony in this action has been, at the time and place specified in the notice and the whole matter of the admissibility of the testimony, whether the Examiner had the power to take it, and all other matters pertaining thereto to be decided by the Court upon the report of the Examiner, and it may or may not be stricken out as the Court may seem proper, but defendants object and except to the action of the Examiner in refusing to take the testimony as part of the testimony in this case, claiming he has no authority or power to rule as to whether or not this testimony is admissible or put in within the time.

Counsel for complainant, in support of the Examiner's position, cites the sixty-seventh rule in equity of the Supreme Court of the United States and the order of Judge De Haven fixing the time, and the rules and practice of this Court with reference to taking testimony in equity, and in support of the Examiner's position that he has no power to take the testimony as stated by defendants' counsel, and has no power to take it and make it a part of the record in this case, or to return it as testimony in any way taken or bearing upon this case, and further that the Examiner has no power to take the testimony of any party beyond the time specially fixed by the Court for the taking of testimony of another party.

Counsel for defendants states that if the position of complainant's counsel is correct, the Examiner had no authority or power to take down as part of the testimony in this case the evidence this day offered upon the part of the complainant, because said testimony is plainly no rebutting testimony, or in contradiction of anything offered

upon the part of defendants, and if this is true the Examiner had as much right to rule upon that matter as he has to rule upon the question as to whether or not the testimony now being offered by the defendants is in time, and if this rule is to govern, then upon this ground the Examiner could exclude from his report of this testimony all the testimony offered in pretended rebuttal by complainant.

Counsel for complainant states that within the time allowed by law and the rules of this Court and the order of Judge De Haven he has produced witnesses before the Examiner, who have testified to facts; that he has complied with the rules and practice of this Court, and that the Examiner has done his duty in taking down the evidence of complainant's witnesses, who were in all respects properly subpoenaed, and who were in all respects properly before the Court, and before the expiration of complainant's time.

IN REBUTTAL.

CATHERINE NIEDENHOFEN, a witness sworn on behalf of the complainant, testified as follows:

Direct Examination.

(By Mr. DRENNEN.)

Q. State your full name.

A. Catherina Niedenhofen.

Q. Where do you reside?

A. Butte City, Montana.

Q. How long have you resided in Butte City?

A. About twenty-five years.

Q. What has been your business, Mrs. Niedenhofen?

A. Merchandise.

Q. How long have you been engaged in merchandising in Butte? A. Twenty-three years in Butte.

Q. Are you acquainted with James A. Talbott, one of the defendants in this action? A. Yes, sir.

Q. How long have you known Mr. Talbott?

A. I have known him about twenty years.

Q. Have you known Mr. Talbott imtimately during that time? A. Not all that time; no.

Q. How much of that time?

A. Intimately about a year and nine months—eight months.

Q. Are you related to Mr. Talbott or his family in any way? A. Yes.

Q. What is that relationship?

A. By marriage; my son married his daughter.

Q. When did that marriage take place?

A. In 1896.

Q. Do you know the reputation of Mr. Talbott for truth in the community in which he resides?

Counsel for defendants object as not being rebutting testimony, and testimony which, if admissible for any purpose, should have been brought out on complainant's case in chief, in which nothing whatever was brought out or attempted to be brought out in regard to Mr. Talbott's reputation or character, and all that has been brought out in reference to that matter was brought out by improper cross-examination on the part of complainant's counsel of the witnesses introduced by the defend-

ants. Objected to, further, for the reason that Mr. Talbott has not testified here or been a witness in this case.

Counsel for complainant calls the attention of the Court to the fact that Mr. Dixon, counsel for defendants, on direct examination of E. Warren Toole asked him questions with respect to the reputation of James A. Talbott in this community, and this evidence is in rebuttal of that testimony.

Counsel for defendants calls the attention of the Court to the fact that the questions asked in that particular were on re-examination after the cross-examination on the part of complainant had attempted to go into that matter.

A. Yes.

Q. Please state what that reputation is, good or bad.

(Same objection by counsel for defendants.)

A. It is very bad.

Q. You may state, Mrs. Niedenhofen, if you know the reputation of Mr. Talbott in the community in which he resides for honesty and integrity?

(Objected to by counsel for defendants for the same reason stated in the objection to the preceding interrogatories, as not being proper evidence in rebuttal.)

A. Yes, I do.

Q. You may state what that reputation is, good or bad.

Counsel for defendants object to this question for the same reason stated in the objection to the preceding interrogatory, and for the further reason that there are no allegations in the bill that authorize the introduction of such testimony.

A. It is bad.

Q. Mrs. Niedenhofen, do you know what the reputation of James A. Talbott for truth was in the community in which he resided during the year 1894?

Counsel for defendants object to this question for the same reasons stated in the objection to the foregoing interrogatory.

A. It is very bad.

Q. Do you know the reputation of James A. Talbott in the year 1894, for truth in the community in which he resided?

Counsel for defendants object to this question for the same reasons stated in the objection to the foregoing interrogatory.

A. I do.

Q. You may state what that reputation was, good or bad.

(Objected to by counsel for defendants for the same reasons stated in the objection to the foregoing interrogatory.)

A. It was bad.

Q. Do you know the reputation of James A. Talbott for honesty and integrity in the year 1894, in the community in which he resided?

(Objected to by counsel for defendants for the same reasons stated in the objection to the foregoing interrogatory.)

A. I do.

Q. What was that reputation, good or bad.

(Objected to by counsel for defendants for the same reasons stated in the objection to the foregoing interrogatory.)

A. It was bad.

Q. Have you seen Mr. Talbott lately, Mrs. Niedenhofen?

A. I seen him about two weeks ago; passed the house —passed my store.

Q. Where—here in Butte? A. Yes.

Q. Have you seen him frequently during the summer?

A. Seen him pretty near every day, passing.

Q. Is your son living that you speak of?

A. No; he is dead.

Q. When did he die, Mrs. Niedenhofen?

A. He died in 1897.

Q. About what time of the year?

A. First of the year, first of January.

Q. Did Mr. Talbott come to see you about that time?

A. Oh, yes.

Q. Did you have any conversations with Mr. Talbott at or shortly after the time of your son's death?

A. I did.

Q. Did you have any conversation about that time with Mr. James A. Talbott with regard to his suit as administrator for the stock of the First National Bank of Butte?

Counsel for defendants object to this question as immaterial and irrelevant and not rebutting testimony, or in contradiction of anything brought out by defendants in their testimony, or if admissible at all the evidence should have been introduced on the part of complainant as part of her case in chief, and further upon the ground that Mr. Talbott has not been a witness in this case, and there are no statements made or acts done by him brought

out upon the evidence for the defendants to be contradicted or rebutted.

A. Oh, yes, I did.

Q. Where did that conversation take place, Mrs. Niedenhofen?

(Objected to by counsel for defendants for the same reason stated in the objection to the last preceding interrogatory.)

A. Right in my kitchen.

Q. You may state what Mr. Talbott stated in that conversation.

(Objected to by counsel for defendants for the same reasons stated in the objection to the preceding interrogatory.)

A. He came in to console me. He said, "Mrs. Niedenhofen, you did not lose any more than I did." I did not lose any more than he did because he thought he had somebody now that he could depend upon, or if he wanted to make a trip that he had somebody to put into the bank to take care of his part of the bank, and what a good boy he was, and how good he was to him during the bank stock case business, while he was in office too, he had done for him—

Q. Who did he refer to when he said what a good boy he was? A. To my son.

Counsel for defendants move to strike out the foregoing answer as improper rebuttal testimony and not in contradiction of anything brought out on examination of defendants' witnesses.

Q. What further, if anything, did Mr. Talbott state to you in that conversation?

(Objected to by counsel for defendants for the same reasons stated in the objections to the last preceding interrogatory.)

A. He told me that up in the District Court when the bank stock case came up that they had everything fixed that they possible could not lose the bank stock case; that they had the jury fixed and they had McHatton fixed.

Counsel for defendants move to strike out the foregoing answer on the ground that it is not rebuttal of anything brought out on the examination of the witnesses for the defendants.

Q. Did he say why they had it fixed that way?

Counsel for defendants object to this question for the same reason stated in the objection to the preceding interrogatory.

A. Yes; he said they had it fixed the same as they could not lose the bank stock; that Jim and John Forbis wanted a jury and Mr. Dixon wanted it left to Judge McHatton to decide; and that they had to give McHatton plenty; that it cost them lots of money.

Counsel for defendants move to strike out the foregoing answer on the ground that it is not rebuttal of anything brought out by defendants in their testimony, and for the further reason that the evidence is not responsive to any of the allegations in the complaint, no charge being made therein against Judge McHatton or the other parties mentioned, nor any allegation that there was improper or undue influence of the court or Judge on the trial of the bank stock case.

Counsel for complainant states that the bill charges conspiracy generally and that the facts now testified to

were only recently discovered, and that they will ask the Court, if necessary, to amend the bill to conform to the proof.

Counsel for defendants state that according to the theory of counsel for complainant he should have obtained leave of Court before introducing his testimony.

Q. Did he explain to you what all this was done for?

Counsel for defendants object to this question for the same reasons stated in the objection to the last preceding interrogatory.

A. Yes; in order to get the bank stock case for Andy.

Counsel for defendants move to strike out all of the foregoing answer for the same reasons upon which they moved to strike out the preceding answer.

Q. Who was Andy? A. Andy Davis.

Q. Is that Andrew J. Davis, Jr., president of the First National Bank of Butte. A. Yes, sir.

Q. Who did Mr. Talbott tell you done these things he told you about?

Counsel for defendants object to this question upon the same grounds as stated in the objection to the last preceding question, and for the further reason that the declarations of Talbott are not in any way binding upon the other parties defendants to this suit.

A. My son.

Q. What was your son's full name?

A. Henry Alexander Niedenhofen.

Q. Did he explain to you why your son did these things?

(Objected to by counsel for defendants upon the same grounds as stated in the objection to the preceding interrogatory.)

A. Yes; in order to get the bank stock for Andy Davis; that is why he did it.

Counsel for defendants move to strike out this answer on the ground that it is not in rebuttal of any of the testimony given on the part of defendants, and further because the declarations of Talbott are not binding upon the other parties defendants herein; and also because it is not supported by any of the allegations of the bill.

Q. Did Mr. Talbott tell you who your son did this for?

Counsel for defendants object to this question on the same ground stated in the objection to the foregoing question, and also because the same is leading and not proper testimony in rebuttal.

A. Yes; so Andy Davis would win the bank stocks.

Counsel for defendants move to strike out all this answer for the same reasons given in the motion to strike out the last preceding answer.

Q. In that conversation, Mrs. Niedenhofen, did Mr. Talbott tell you who got your son Alex to do this?

Counsel for defendants object to this answer on the same ground stated in the objection to the preceding question as not rebutting testimony, and also for the reason that it is leading.

A. Yes; he did.

Q. Who did? A. Mr. Talbott.

Counsel for defendants move to strike out the foregoing answer for the same reason as given in the motion to strike out the preceding answer of the witness.

Q. Do I understand, Mrs. Niedenhofen, that Mr. Talbott told you that he had told your son Alex to do these things?

Counsel for defendants object to this question upon the same ground stated in the objection to the preceding interrogatory, and also upon the ground that the question is leading and suggesting the answer to the witness.

A. Yes.

Counsel for defendants move to strike out all this answer for the same reason given in the motion to strike out the preceding answer.

Q. What official position, if any, did your son hold at the time of or prior to the time of his death?

A. He was clerk of the District Court.

Q. What county and State?

A. State of Montana.

Q. What county—whereabouts was it he was clerk of the District Court? A. Here in Butte.

Q. Silver Bow county? A. Yes, sir.

Q. How long did he hold that position?

A. Four years.

Q. Was he clerk of the District Court during the year 1894? A. Yes, sir.

Q. In that conversation, Mrs. Niedenhofen, that you had with Mr. Talbott that evening, did he say any thing else to you about the bank stock case?

(Objected to by counsel for defendants for the same reasons stated in the objection to the foregoing interrogatory.)

A. Yes, he did.

Q. What else did he say to you in regard to that suit, if you remember?

(Objected to by counsel for defendants for the same reasons stated in the objection to the foregoing interrogatory, and as improper testimony in rebuttal.)

A. He told me that he gave him nineteen thousand dollars to go to Helena to knock the bill of five judges instead of three.

(Defendants move to strike out the foregoing answer of the witness for the same reasons stated in the motion to strike out the answer to the preceding answer.)

Q. Told you he gave who the nineteen thousand dollars?

(Defendants object to this question on the same grounds stated in the objection to the foregoing interrogatory.)

A. He gave my son the nineteen thousand dollars.

(Defendants move to strike out the answer of the witness on the same grounds stated in the motion to strike out the preceding answer.)

Q. Did he say why he gave your son this nineteen thousand dollars to knock this bill?

(Defendants object to this question on the same grounds stated in the objection to the preceding question.)

A. Yes; to knock this bill; they did not want five—only wanted the three judges.

(Defendants move to strike out the answer of the witness on the same grounds stated in the motion to strike out the preceding answer.)

Q. Did he say what his object was in giving this nineteen thousand dollars in order to defeat this bill?

Counsel for defendants object to this question for the same reasons stated in the objection to the preceding question put to the witness, and as not proper testimony in rebuttal or in support of any allegations in the bill.

A. Yes; in order for Andy to get the bank stock.

Counsel for defendants move to strike out the answer of the witness on the same grounds stated in the motion to strike out the preceding answer.

Counsel for complainant offers in evidence a bill introduced in the legislature of Montana on the 4th day of March, 1895, read and referred and surrendered by committee after adjournment for the increase of the Supreme Court of the State of Montana by two additional Judges, duly certified by T. S. Hogan, Secretary of State.

(Objected to by counsel for defendants upon the grounds that it is immaterial and irrelevant, and not in support of any allegations of complainant's bill in this suit, and not proper rebutting testimony, but testimony which, if in any point of view it could be material, would be part of complainant's case in chief. No objection is made to the fact that it is certified to by the secretary of State. The same is introduced in evidence and marked "Complainant's Exhibit, Judiciary Bill, August 30th, 1898, C. W. B., Special Examiner.")

Q. Mrs. Niedenhofen, you spoke of a conversation which you described as having with James A. Talbott about his referring to one McHatton; will you explain who Mr. McHatton was? A. He was Judge.

Q. What Judge?

A. Judge of the District Court.

Q. Where—what District Court?

A. Here in Butte, Silver Bow county.

Q. At what time was he Judge?

A. He was Judge all the time my son was clerk.

Q. Was he Judge in 1894?

A. Yes, sir; he was Judge the four years that my son was in office.

Q. As clerk? A. Yes, as clerk.

Counsel for defendants move to strike out all of the foregoing testimony given by this witness, on the grounds, first, that it is not in support of any of the allegations in complainant's bill; second, that it is irrelevant and immaterial; third, that it is not proper rebutting testimony, or testimony which if admissible for any purpose was a part of complainant's case and should have been offered in evidence in making out her case in the first instance; fourth, because it relates to certain declarations of defendant Talbott which are not shown to have been made in the presence of or known to any of the other defendants in this suit.

Cross-Examination.

(By Mr. JOHN F. FORBIS.)

Q. Mrs. Niedenhofen, you say your son married Mr. Talbott's daughter? A. Yes, sir.

Q. How long did that relation exist, Mrs. Niedenhofen, before your son's death?

A. A year and nine months.

Q. He was married a year and nine months?

A. No; he was married two and a half months.

Q. At the time of your son's death you and Mr. Talbott were good friends apparently? A. Oh, yes.

Q. When was it this conversation took place between you and Mr. Talbott?

A. About a week after my son's death.

Q. Was he then buried?

A. He was buried, certainly.

Q. He was buried from Mr. Talbott's house, I believe? A. Yes; I believe on the third.

Q. Your son died in Salt Lake City?

A. Yes, sir.

Q. How long after the funeral was it this conversation took place between you and Mr. Talbott?

A. It was between a week and ten days.

Q. After the funeral? A. No; after his death.

Q. How long after the funeral was the conversation?

A. You can figure that out, can't you? Three days after he was dead he was buried.

Q. So that it was less than a week from the time of the burial of your son that this conversation between you and Mr. Talbott occurred? A. Yes, sir.

Q. Who was present besides you and Mr. Talbott?

A. Him and I alone.

Q. Where were you?

A. In the kitchen in my house.

Q. Mr. Talbott came there to console you?

A. Yes, sir; we talked in general about these things what he had done.

Q. Was it at that conversation that Mr. Talbott made all these admissions to you relative to both the purchase of the Judge and the jury and the attempt to defeat the the bill to increase the Supreme Court Judges?

A. Yes, sir; we had a long talk.

Q. That was all in one conversation?

A. One conversation, one afternoon; yes, sir.

Q. Nobody was present but you and Mr. Talbott?

A. Nobody else was present.

Q. This was very soon after your son's death?

A. Yes.

Q. You took the death of your son with a great deal of grief? A. I should think so; he was all I had.

Q. He was a boy you thought a great deal of?

A. Yes, certainly I did; I only had the one.

Q. The only surviving member of your family except yourself? A. Yes.

Q. Mr. Talbott told you that he felt the loss was very great to him also?

A. He wanted a man to be in the bank, take care of the bank and watch the bank when he was gone.

A. And in this sort of a talk you had at that time you and Mr. Talbott devoted yourselves to talking about crimes your son had committed?

A. Yes, sir; we talked the matter over.

Q. Within a week after his death?

A. He was in there talking about what he owned and what he had, what interest he had down at Gaylord.

Q. It must have made you very angry, didn't it, to have Mr. Talbott talk about your son that way?

A. About what?

Q. Committing those crimes during his lifetime?

A. Made me angry?

Q. Didn't it make you very angry?

A. Of course it didn't.

Q. What did you tell Mr. Talbott?

A. I told Mr. Talbott that my boy took chances of going to the penitentiary two or three times for doing this work.

Q. You were there talking all the time and recalling all the crimes that he had committed in his lifetime?

A. Just this bank stocks; that is all.

Q. Didn't you feel it was a little indelicate subject to be discussing with a mother about crimes committed by her son?

A. Oh, yes; you know how they are—they don't care for anything.

Q. You care?

A. Yes, I cared; but we talked the matter over what he had done.

Q. Did you take it in the spirit of casting some reflections upon Alex at that time, or did you think they were saying only good of the dead—did you think he was speaking of good or bad deeds?

A. He was speaking of his bad deeds; that surely is not good.

Q. Had Mr. Talbott ever told you these things before?

A. No.

Q. This was the first conversation you had ever had with Mr. Talbott relative to these crimes?

A. Yes; it was.

Q. And did you tell him that you did not believe it, or did believe it? A. Oh, I believed it.

Q. You believed your son had done all these things?

A. Yes.

Q. Believed Mr. Talbott was telling you the truth?

A. Certainly.

Q. It must have made you feel very badly?

A. Yes; it did.

Q. Yet this was a meeting of condolence?

A. Condolence, yes; he was saying how good and kind he was and what a smart boy he was.

Q. These good deeds consisted of violating the laws of his country?

A. Yes; they were good for him and Andy, good deeds to him.

Q. He spoke of them as though they were rather to be commended?

A. He spoke as though they were all right; they had the bank stocks and they did not care how they got them.

Q. And they made a crminial of your son to get them?

A. Certainly they did; and my son's conscience troubled him. That is what troubled his conscience; killed him.

Q. His conscience, you think?

A. Yes; his conscience killed him, because he did these things.

Q. Don't you think this was a rather peculiar death scene to follow a death, discuss a son to his mother in such a way as this. Rather curious for a man to come to the mother of a dead son and discuss his crimes with her?

A. Not him; he has got no feeling.

Q. You discussed them also?

A. I just listened to him.

Q. You didn't say a word? A. I listened to him.

Q. These were the facts that appealed to Mr. Talbott in considering your son such a good boy, was the commission of these offenses?

A. Certainly, all he did he done for him while he was in office, and he said what a smart boy he was.

Q. You have considerable feeling against Mr. Talbott, have you not?

A. Oh, no, not so much.

Q. You have been in litigation with his daughter?

A. Yes; I have.

Q. Has there not been a considerable number of lawsuits between you and your daughter in law, your son's wife?

A. No lawsuits whatever; only they wanted to steal my dead boy's body and move him to Spokane, and I would not stand it.

Q. But you got into court over the matter?

A. Certainly; I never was in the courthouse before in my life.

Q. But there is considerable feeling between you and Mr. Talbott, is there not? A. No, not so much.

Q. Don't you speak?

A. I would speak, only he goes by and never looks in. I never saw him to speak to if he would. If he would say "how do you do," I would speak.

Q. He does not speak to you or you to him?

A. No; he does not.

Q. These difficulties arose after this conversation?

A. Yes; when they commenced to steal and rob from me.

Q. And some feeling exists between you and your son's wife or widow? A. Yes, just the same.

Q. You spoke of Judge McHatton, who was the Judge of the District Court at the time of the litigation of the decision in the Davis case; he was the attorney for Mrs. Niedenhofen, your daughter in law? A. Yes, sir.

Q. He has been the attorney for her in several estate matters, or in that whole estate matter?

A. He was the attorney for the whole estate.

Q. And you have some feeling against him, have you not?

A. Well, not very much feeling against him now.

Q. Were you not very much offended at the bill he put in for services against your son's estate?

A. Well, I objected to it. I thought it was rather a big bill, fifteen hundred dollars.

Q. Did you not also object to an allowance made to your son's widow or attempted to be made?

A. Yes; I did.

Q. Now, the parties that were interested in this suit were James A. Talbott, your daughter in law, and Judge McHatton, were they not? A. Yes.

Q. Now, is not the same feeling existing between you and all three of these parties at the present time?

A. I had not got very much against him, only I would not allow them to steal the estate like they stole the bank stock, my boy's estate. They tried to steal the whole of it and I would not allow them, that is what brought us to court.

Q. And caused considerable feeling?

A. Certainly it did.

Q. That feeling still exists?

A. Everybody in town said before Talbott got done with me there would not be a nickle left. I told them I would show him and I would not stand it, and I did not.

Q. That feeling exists for that reason?

A. Yes; because they commenced to steal.

Q. So that you have no love for Mr. Talbott, your daughter in law or Judge McHatton?

A. I have not anything against Judge McHatton, only he charged too much in the settling of the estate; that is all I objected, but he got it; that is all I know.

Q. Did you ever tell anybody before about this conversation you had with Mr. Talbott?

A. No, I did not.

Q. When did you first tell it?

A. I kept that to myself until lately.

Q. How did you happen to tell it lately—who did you tell it to first?

A. I do not remember, though I told it to several parties around here.

Q. How long since? A. Two or three weeks.

Q. You cannot tell who was the first person you told?

A. No, I do not remember.

Q. Is it not a fact you told it to Mr. J. R. Boyce?

A. I believe I did speak to him once about it.

Q. Didn't he go to see you about this matter and get you to tell him? A. No.

Q. Did you go to hunt him?

A. He came to my place of business, as he always comes and drinks soda water at times during the summer.

Q. How did you happen to tell him?

A. We got to talking about this affair, this matter—

Q. Was that not several months since?

A. When I talked to Boyce? No; I do not think so.

Q. Didn't you talk to Mr. Boyce before he testified in

this case over a month ago—nearly two months ago, I will say? A. I do not remember.

Q. Who did you tell the facts to except Mr. Boyce, if you can remember?

A. I do not remember who it was.

Q. Did you tell Mr. Drennen and Mr. Demond, the attorneys in this case?

A. No; I did not tell them; they came to me once to see if I knew anything about this bank stock case.

Q. When was it first understood that you were to come here and testify? A. Just a few days ago.

Q. Do you know when Mr. Toole was here testifying, Mrs. Niedenhofen? A. No; I do not.

Q. Were you not here in the courtroom?

A. No.

Q. You remember the fact that he came here and testified; didn't you see it in the paper?

A. Yes; seen it in the paper.

Q. Do you remember Mr. Boyce testifying here in the opening of this case, nearly three months since?

A. I know he testified, but I do not remember how long ago; I did not keep any track of it.

Q. Now, was it not before Mr. Boyce's testimony, before he gave his testimony that you told him about what was told here to-day? A. No, I do not know.

Q. You do not remember when it was that you told him? A. No; I do not.

Q. How long has it been since Mr. Talbott had that conversation with you?

A. That was a week after my son died.

Q. When did your son die?

A. The first of January, 1897.

Q. So that it is about a year and nine months?

A. Yes.

Q. And from that time until very recently you have never told the facts to anyone?

A. No; I never told the facts of Mr. Talbott's conversation at all to anyone.

Q. You never told the facts of Mr. Talbott's conversation to anyone until very recently? A. No.

Q. How did you happen to tell it very recently?

A. I just happened to speak about it.

Q. To who? A. I do not remember.

Q. Who did you speak to besides the first one you spoke to? Do you remember anybody that you did speak to?

A. I did not speak to anybody about Mr. Talbott at all until just lately.

Q. Who did you speak to then about it?

A. I do not remember.

Q. You do not remember who you first told about this conversation with Mr. Talbott? A. No; I do not.

Q. And you do not remember how long since?

A. No; I always kept these conversations to myself until lately.

Q. Why did you keep it to yourself, Mrs. Niedenhofen? A. I did not care to speak about it.

Q. Yet you finally come and tell these matters, and put them on record against your son? A. Yes.

Q. Did you refuse to speak about them, or decline to speak about them, because you thought it was not creditable to your son?

A. Yes; I did not think it was necessary to tell everybody about it.

Q. What induced you lately to tell this?

A. Oh, I just happened to speak about it.

Q. Do you remember who to, when or where, or anything about it? Didn't some one come to you and ask you if you didn't hear something of this kind?

A. No.

Q. Well did you go voluntarily and tell some one these things? A. No; I do not remember who I told it.

Q. You do not remember whether some one came and asked you to tell it or whether you went voluntarily and told it?

A. I told it to some one, but I do not remember who it was.

Q. You know Mr. Andrew J. Davis, don't you?

A. Yes.

Q. Do you remember a conversation you had with him on the 5th day of last July, about this matter?

A. Yes, sir.

Q. Did you not in that conversation, Mrs. Niedenhofen, tell Mr. Davis that you were going on the stand and were going to testify about the amount of money that had been spent to buy judges, juries, and the legislature not to pass this bill?

A. I do not remember that I told him that.

Q. What did you tell him?

A. I told him things there what Alex had done for him while he was in office.

Q. That was these things you spoke of about bribing

the jury, judge, and going over and bribing the legislature? A. Yes, sir.

Q. Didn't you tell him you were going to testify to these things? A. No, sir.

Q. What did you tell him?

A. I just asked him if Alex didn't do so and so—

Q. Didn't you say you were going on the stand, and he told you to go on and tell everything you knew?

A. No; he did not.

Q. Didn't you threaten his life several times, Mr. Andy Davis and Mr. Talbott too.

A. I threatened his life in this way, that if they did not quit robbing his estate, Mr. Talbott—

Q. What has Mr. Andrew Davis got to do with that?

A. He is at the bottom of it.

Q. So you have a feeling not only against Mr. Talbott, but against Mr. Davis?

A. Not in the bank stock; I have no feeling.

Q. You have feeling against him personally?

A. Well, in my own case, I told him he should not meddle with it; let me alone in caring for my dead boy's body—not take it out of the cemetery.

Q. What had he done about it?

A. Whatever he told Talbott, Talbott would do.

Q. Did he tell Talbott to go and molest you?

A. That is my belief.

Q. You do not know anything about it except on suspicion? A. Yes.

Q. On that suspicion you threatened to kill him?

A. I told them if they did not let me alone—take my dead boy's body up and move it, I would take the law in

my own hands and they would have to take the consequences.

Q. Was not this time you threatened Mr. Davis' life after the question of the removal of your son's body had been settled?

A. Yes, but they still kept it up, not about the body—other things, administration and everything, trying to rob the last nickle I had that was coming to me from my boy's estate.

Q. So you felt very much aggrieved by all of these parties, did you not, Mrs. Neidenhofen, even until very lately? A. Yes.

Q. Did you ever send word to Mr. Davis or Mr. Talbott that you were going to testify in this case?

A. If I would be subpoenaed.

Q. If you would be subpoenaed you were going to testify? A. Yes.

Q. Didn't you at the same time give them to understand that you would not testify if they would make things all right? A. No; I did not.

Q. Why did you send them this word?

A. So they would let me alone.

Q. Now, was it not the fact that you sent them this word that you were going to testify in order to get them to give you money or something equivalent to it if you did not testify? A. No.

Q. Why did you send them the word?

A. I did not send them word I was goin to testify against them; I did not.

Q. You notified them, directly or indirectly, that you were going to testify, did you not?

A. No; I did not.

Counsel for James A. Talbott states that on account of the fullness of the cross-examination by Mr. Forbis he does not wish to cross-examine the witness further. Counsel for defendant Leyson state that they have no cross-examination to make.

EDWARD POTTING, a witness sworn on behalf of the complainant, testified as follows:

Direct Examination.

(By Mr. DEMOND.)

Q. What is your full name?

A. Edward Potting.

Q. Where do you reside? A. Butte.

Q. How long have you resided here?

A. Twenty years.

Q. What is your business? A. Merchandise.

Q. Are you acquainted with James A. Talbott?

A. I am.

Q. How long have you known him?

A. About seventeen or eighteen years.

Q. Do you know Mr. Talbott's reputation in Butte where he resides for truth?

Counsel for defendants object to this question as not rebutting testimony, or in rebuttal of anything brought out in the testimony on the part of defendants in this action, and further, as not responsive or relevant to any allegation in the bill.

A. I do.

Q. What is that reputation?

Counsel for defendants object to this question upon the same grounds as stated in the objection to the preceding interrogatory.

A. It is bad.

Q. Do you know Mr. James A. Talbott's reputation in the year 1894 for truth in Butte?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding interrogatories.

A. Yes, sir.

Counsel for defendants move to strike out this answer on the ground that it is not proper rebutting testimony and not in support of any of the allegations in the complaint.

Q. What was it, good or bad?

Counsel for defendants object to this question on the same grounds stated in the objection to the preceding interrogatory.

A. Bad.

(Same motion to strike out.)

Q. Do you know the reputation of Mr. James A. Talbott in Butte where he resides for honesty and integrity?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding interrogatory.

A. Yes, sir.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. What is that reputation, good or bad?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding question.

A. It is bad.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer of the witness.

Q. Do you know what the reputation of James A. Talbott was in 1894 in Butte for honesty and integrity?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding interrogatory.

A. Yes, sir.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. What was that reputation in 1894 for honesty and integrity, whether good or bad?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding interrogatory.

A. Bad.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. Do you know Mr. James A. Talbott, whom you refer to, who is he?

A. Vice-president of the First National Bank of Butte.

Q. Do you recollect any conversation with Mr. James A. Talbott with reference to these proceedings to secure

the stock of the First National Bank of Butte for the estate of Andrew J. Davis, deceased?

Counsel for defendants object to this question as immaterial and irrelevant, and not responsive to any allegation in the bill, not proper testimony in rebuttal, but only admissible, if at all, in support of the testimony of the complainant in opening her case.

A. Do you want to know if I had a conversation?

Counsel for defendants move to strike out this answer of the witness for the same reasons stated in the motion to strike out the preceding answers.

Q. Please state when and where this conversation took place.

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding interrogatory.

A. It occurred either in April or May, 1897, at the corner of Clark's Bank.

Q. That is on the corner of Broadway and Main?

A. It was on the Broadway side of the bank.

Q. Near Main street? A. Yes, sir.

Counsel for defendants move to strike out this answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. You will now please state, Mr. Potting, what you said to Mr. Talbott and what he said to you, giving the words, if possible; otherwise the substance of the conversation.

Counsel for defendants object to this question for the same reasons stated in the objection to the preceding interrogatory.

A. I met him at Clark's Bank and had a conversation with him in regard to the estate matter of H. A. Niedenhofen, and after we got through with that he spoke to me and said, "I want to show you how much confidence I had in the boy. I let him go to Helena and spend nineteen thousand dollars and kill the bill in the legislature of five judges, so that Andy should have the bank."

Counsel for defendants move to strike all of the foregoing answer of the witness, upon the ground that it is immaterial and irrelevant, and not proper rebutting testimony and not in support of any of the allegations of the bill, but gives the declaration, or purports to give the declaration of Talbott, which are not shown to have been made or known to the other defendants in this suit, and which were not in any way shown to have been binding upon them, or to have come to their knowledge.

Q. You spoke of Talbott speaking to you and stating what a smart boy he was; what boy was being spoken of?

Counsel for defendants object to this question on the same grounds stated in the objection to the preceding interrogatory.

A. H. A. Niedenhofen.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer of the witness.

Q. This H. A. Niedenhofen was the son of Mrs. Niedenhofen, the previous witness? A. Yes, sir.

Q. And the clerk of the District Court concerning whom she testified? A. Yes, sir.

Counsel for defendants move to strike out all of the preceding testimony of the witness for the reason that

it is immaterial and irrelevant and not proper rebutting testimony, and not in support of any of the allegations contained in the bill, and consists of the declarations of other parties defendants in this suit, or to have come to their knowledge, and which, secondly, can in no way affect them.

Counsel for complainant now states upon the record in answer to all of the various objections hitherto made to the testimony of the various witnesses that the proof in rebuttal and testimony deny conspiracy by defendants; that the bill alleges conspiracy, and that the declarations of one conspirator is proof against the others and for that reason the testimony is introduced.

Cross-Examination.

(By Mr. SCALLON.)

Q. What business are you in? A. Merchandise.

Q. With whom? A. Mrs. C. Niedenhofen.

Q. In partnership, or as clerk?

A. No; I am a partner.

Q. Where do you live?

A. 39 West Park street.

Q. What place is that?

A. Mrs. Niedenhofen's.

Q. How long have you lived there?

A. Sixteen or seventeen years.

Q. What relation do you sustain to Mrs. Niedenhofen? A. None whatever.

Q. Are you a partner of hers?

A. Yes, sir.

Q. That is a relation, is it not?

A. I do not know as it is.

Q. Have you any other relation with her?

A. No, sir.

Q. How long have you lived with her?

A. Lived where?

Q. With Mrs. Niedenhofen?

A. How long have I lived with her?

Q. Been in that business?

A. I have not lived with her.

Q. Where do you live?

A. I live in the rear of the building.

Q. Where does she live?

A. She lives in the rear.

Q. Don't you live in the same building?

A. No, sir; mine is a different building.

Q. What is the number of her building? A. 39.

Q. What is the number of yours?

A. It has no number; it is in the alley.

Q. On the same premises?

A. On the same ground.

Q. What were the relations of yourself and Mrs. Niedenhofen with Mr. Talbott at the time you had that conversation prior thereto?

A. I did not have any relations with Mr. Talbott.

Q. You knew him? A. Yes.

Q. Did you speak to him occasionally?

A. Yes, I spoke to him.

Q. Those were relations, were they not?

A. Yes; I guess so. I thought you meant whether I was related to him.

Q. Is that what you understand by the word "rela-

tionship"? What intercourse did you have with Mr. Talbott?

Counsel for complainant objects to the question as ambiguous.

A. In what way?

Q. In any way, social or otherwise.

A. I did not have any.

Q. How long had you and he been acquainted at the time of this conversation at the corner of Clark's Bank?

A. I knew him seventeen or eighteen years ago.

Q. Well, during this seventeen or eighteen years what have been your relations with Mr. Talbott, friendly or otherwise?

A. Friendly, as far as I know.

Q. Intimate or otherwise? A. Not intimate.

Q. Was he a stranger to you?

A. Not a perfect stranger. I knew him; never came in contact with him.

Q. In what way? A. In any way.

Q. You say he and Mrs. Niedenhofen—were they related?

Counsel for complainant objects to this question upon the ground that it is not known to the witness what the counsel is driving at.

A. Don't know what you mean.

Q. Were they friendly or otherwise?

A. At what time?

Q. Any time.

A. They were friendly at times, at times they were not.

Q. When were they friendly and when were they not?

A. I never knew that they were not.

Q. Didn't you just state that at times they were not?

A. I supposed she was not; I don't know how he was.

Q. She was on unfriendly terms with Talbott?

A. No, sir.

Q. When was that?

A. I do not know any particular time.

Q. You know that she was unfriendly? A. Yes.

Q. You cannot say when?

A. I think it was at the time they had the trouble about the administration and body racket.

Q. After the death of H. A. Niedenhofen?

A. Yes.

Q. Was that before or after your alleged conversation with Mr. Talbott?

A. I had my conversation after that with Mr. Talbott.

Q. I supposed you espoused Mrs. Niedenhofen's quarrel with Mr. Talbott? A. No, sir.

Q. You did not take sides with her? A. No, sir.

Q. No concern of yours?

A. None of my business.

Q. Did not affect you in any way?

A. I do not know it would.

Q. Did not take her part at all?

A. I did not take any part.

Q. Since the trouble arose between Mrs. Niedenhofen and the Talbott family or Mr. Talbott, what have your relations with Mr. Talbott been?

A. None; have not had any.

Q. They were strained, were they not?

A. I do not know whether they were strained or not.

Q. Do you know what that word means?

A. No, sir.

Q. What do you understand by the word "relations"?

A. I suppose if I come in contact with a person, have conversations and one thing or another.

Q. Was not your conversation with Mr. Talbott in relation to the Neidenhofen estate at that time, on that particular occasion?

A. At that time?

Q. Yes, sir; at that very time, when you claimed to have had a conversation about the Davis matter?

A. Why, I went to see him and told him McHatton had come down and was going to move Niedenhofen's body out.

Q. What else?

A. Want me to tell what he said?

Q. I have asked you, sir, for the conversation.

A. I have told it just now.

Q. Is that the whole of the conversation?

A. No.

Q. Please answer the question, then.

A. I have answered the other part of the question that he was telling me how much confidence he had in the boy; he sent him to Helena.

Q. I have asked you, sir, what the conversation in relation to the Niedenhofen estate was.

A. I went to him there and told him McHatton came down and wanted to take up Niedenhofen's body and move it to Spokane Falls, and I told him I did not think it was a good thing for him to do.

Q. Was that all that was said about it?

A. That is all.

Q. Did Mr. Talbott make any answer?

A. Yes, sir.

Q. Why don't you say what he said. I am waiting for you to answer.

A. He said it was the women folks; he wanted the body to be left there. It was the women folks that wanted to move him.

Q. You went to Mr. Talbott, you say—where to?

A. Met him on the corner of Clark's Bank.

Q. Where were you going?

A. Went there for the purpose of meeting him.

Q. Did you expect to find him on the corner.

A. I expected him to come that way from lunch.

Q. Were you waiting there for him?

A. Not particularly.

Q. Were you not looking for him? A. Yes, sir.

Q. Why did you go out to look for him?

A. To tell him what McHatton said.

Q. Why?

A. I do not know; probably because I was told to go and tell him.

Q. Who told you? A. Mrs. Niedenhofen.

Q. What else, if anything, was said about the Niedenhofen estate? A. That is all.

Q. How did Mr. Talbott come to make the statement that you impute to him?

A. I do not know what you mean by "impute."

Q. That you claim he said?

A. I do not understand the question clearly.

Q. Have you said all of the conversation between you and Mr. Talbott on the occasion you refer to?

A. Have I said all; yes, sir.

Q. Every word of it? A. Yes, sir.

Q. Then, if I understand you, you went to him and told him that McHatton had said they were going to move the body? A. Yes, sir.

Q. He replied to you, in effect, that the women folks wanted to do it, that he wanted it kept, and then he came right out and told you that he had so much confidence in Alex that he let him spend nineteen thousand dollars?

A. Yes, sir.

Q. Without any introduction?

A. Why, he was telling me how much he thought of the boy and that it was the women folks; he wanted the body left there.

Q. Can you repeat his exact language?

A. I have stated it as near as I can.

Q. At what time of the year was that?

A. It was either April or May, '97, in the spring.

Q. Can you recollect any more nearly the date?

A. I can by referring to the time they wanted to move him.

Q. Have you referred to that time? A. No, sir.

Q. Did you expect to be a witness here to-day?

A. No; I did not.

Q. How did you come to the courtroom?

A. Subpoenaed.

Q. When?

A. To-day.

Q. You knew, then, you were to be a witness, what you were to be examined about? A. Yes, sir.

Q. By the way, to whom did you make known that you had that conversation with Mr. Talbott?

A. I do not know. I have been speaking quite frequent about it.

Q. Since when?

A. All the time since the time I had the conversation.

Q. To whom have you spoken about it?

A. Several parties.

Q. Mention them.

A. Anderson and Patterson.

Q. What Anderson and what Patterson?

A. Alex Anderson.

Q. Who is he?

A. I don't know what he is doing.

Q. What Patterson? A. Used to be an ice man.

Q. Is that all? A. Yes, sir.

Q. You and Mrs. Niedenhofen speak about it?

A. I have not spoken to her about it.

Q. You never mentioned it to her?

A. No, sir; not this conversation.

Q. How did you come to be subpoenaed?

A. Because I was served with a paper.

Q. Do you know why you were subpoenaed?

A. To testify.

Q. How did the persons who subpoenaed you get the information?

A. I do not know; suppose they did.

Q. Never saw them? A. Seen them; yes.

Q. Did you speak to the attorneys about it?

A. No, sir.

Q. Never saw the attorneys for the plaintiff before you saw them in court?

A. Yes, I have seen them.

Q. Where? A. On the street.

Q. Did you see them at Mrs. Niedenhofen's?

A. No, sir.

Q. Before the death of Niedenhofen, were not you and Mrs. Niedenhofen very friendly with Mr. Talbott or his family? A. Not so very friendly.

Q. Well, what do you mean by not so very friendly?

A. Was neither friendly or otherwise. I never went around or knew anything about it until after he took sick, when they brought him back here, went to the house; that is the only time I was out there.

Q. What was the sum mentioned by Mr. Talbott?

A. Yes, sir.

Q. What was it? A. I mentioned his name.

Q. I asked you what was the sum mentioned?

A. Nineteen thousand dollars.

Q. You swear you never told Mrs. Niedenhofen about that conversation?

A. Not about what Talbott said. I told her about her affairs about the estate business.

Q. About what Talbott said in relation to Alex?

A. About leaving the body there.

Q. The other part of the conversation?

A. No, sir.

Q. You will swear you never told Mrs. Niedenhofen?

A. No, sir.

Q. Did you tell a man by the name of Anderson? You don't know what he does? A. He is a teamster.

Q. You told a man by the name of Patterson?

A. Yes, sir.

Q. You take your meals in that same building?

A. Yes, sir.

Q. You have for a good many years?

A. Yes, sir.

Q. You are not a blood relative of Mrs. Niedenhofen, or any connection? A. No, sir.

Redirect Examination.

(By Mr. DEMOND.)

Q. Mr. Potting, about how old was Alex Niedenhofen when he died? A. Between thirty and thirty-one.

Q. How old are you? A. I am thirty-four.

Q. You and Alex were boys together?

A. Yes, sir.

Wednesday, August 31, 1898.

Counsel for the respective parties present as before, and hearing resumed.

WILLIAM WILSON, a witness on behalf of the complainant, being duly sworn, testified as follows:

Direct Examination.

(By Mr. DEMOND.)

Q. What is your full name, please?

A. William Wilson.

Q. Where do you reside?

A. Butte, Silver Bow county—Walkerville.

Q. How long have you been in Montana?

A. Thirty-four years—between thirty-three and thirty-four years.

Q. Are you acquainted with Mr. James A. Talbott, now vice-president of the First National Bank of Butte?

A. Yes, sir.

Q. How long have you known him?

A. I have known him about thirty years—over thirty years.

Q. Did you know him in Virginia City about 1865?

A. Yes, sir.

Q. In what business was he then engaged?

Counsel for defendants object to this question upon the ground that it does not relate to anything, and is not in rebuttal of anything called out by defendants upon the examination of their witnesses, and is irrelevant and immaterial and not proper rebutting testimony, but testimony which, if admissible for any purpose, should have been given by plaintiff in making up her case in opening.

A. Well, running a kind of a gambling joint, gambling-house at that time.

Counsel for defendants move to strike out the answer of the witness on the ground that it is not proper testimony in rebuttal, and is not in support of any of the allegations in the complaint, or in any way material to the the issues.

Q. Were there any girls in connection with this joint?

Counsel for defendants object to this question upon the same ground as stated in the objection to the preceding interrogatory.

A. I have seen girls around there; of course it is a long time ago—all drinking beer and whatever else they wanted, I should think.

Counsel for defendants move to strike out the answer of the witness upon the same ground as that stated in the motion to strike out the answer to the preceding question.

Q. Now, coming down to the year 1869, in Beartown, Montana; did you know Mr. Talbott in Beartown?

A. Yes, sir; I did.

Q. What was he doing there?

Counsel for defendants object to this question upon the same ground as stated in the objection to the preceding interrogatories.

A. Well, he was running a small gambling-house at that time.

Counsel for defendants move to strike out the answer of the witness upon the same ground as stated in the motion to strike out the answer to the preceding interrogatories.

Q. Where was Beartown?

A. In Deer Lodge county.

Q. In the State of Montana? A. Yes, sir.

Q. Now, did you know Mr. Talbott in Deer Lodge between 1870 and 1872? A. Yes, sir; I did.

Q. What was his business there?

Counsel for defendants object to this question upon the same ground as stated in the objection to the preceding interrogatories.

A. The same occupation.

Counsel for defendants move to strike out the answer of the witness upon the same ground stated in the motion to strike the preceding answer.

Q. Keeping a gambling-house and saloon?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding interrogatory.

A. Yes, sir.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Counsel for complainant stipulate that counsel for defendants may have the same objection to every question upon every ground known to equitable jurisprudence, and may have the same motion to strike out every answer upon every ground known to equitable jurisprudence. This offer is made to avoid the necessity of objections and motions in order that the witness may proceed concisely and consecutively with his evidence.

Counsel for defendants state that they propose to make their objections in the manner that they think is best, and that they propose to object specifically to every question and answer they consider objectionable.

Q. Are you acquainted with E. Warren Toole, a lawyer in Helena? A. Very well; yes, sir.

Q. State whether or not you have ever seen him gambling at Jim Talbott's gambling-house at Deer Lodge.

Counsel for defendants object to this question as immaterial and irrelevant and not proper rebutting testimony, nor relating to anything called out by defendants in their testimony, and not in support of any of the allegations or statements in the bill, and also as leading.

A. Yes; I have.

Counsel for defendants move to strike out this answer of the witness upon the ground that it is irrelevant and immaterial and not proper rebutting testimony of anything brought out by defendants in their testimony.

Q. Mr. Wilson, Mr. Toole has testified in this case

that he did not know that Mr. Talbott ever kept a gambling-house; you recollect having seen Mr. Toole, I understand, gambling in Mr. Talbott's house about these years?

Counsel for defendants object to this question upon the same grounds stated in the objection to the last preceding interrogatory.

A. Yes, sir.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Counsel for complainant states for the Court that Mr. Toole, upon direct examination under oath swore that he did not know that Mr. Talbott had ever kept a gambling-house; that this testimony is in direct rebuttal to show that Mr. Toole did know that Mr. Talbott had kept a gambling-house, for the reason that he personally, E. Warren Toole, of Helena, Montana, used to indulge in the sportive game of gambling at Deer Lodge in the years 1870 and 1872, and therefore is in direct rebuttal of defendants' evidence.

Counsel for defendants object to any testimony not under oath being given by counsel for complainant, or any statements being offered as to what the evidence in this case shows, the evidence itself, which has been taken down by the Examiner, being the best evidence of what it is and counsel's statements not being in any way legitimate or pertinent to the testimony in the case.

Q. When Mr. Toole was gambling in Mr. James A. Talbott's place in Deer Lodge, do you recollect whether ever Mr. James A. Talbott was dealing faro?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding interrogatory, and also upon the ground that it is leading.

A. He would frequently deal the bank and take his shift at the look-out chair; they generally have a look-out when they deal faro-bank to see that they get all they win.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. Now, coming to the city of Butte, county of Silver Bow, and State of Montana; do you recollect knowing Mr. Talbott here between 1876 and 1877?

Counsel for defendants object to this question upon the same grounds statedin the objection to the preceding question.

A. Yes, sir; very well.

Q. What business was he then engaged in?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding question.

A. Same occupation.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. By "the same occupation," I presume you mean a gambling-house?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding question.

A. Yes; gambling-house.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. Where was his place in Butte?

A. On Main street, somewhere about where the Combination is, a little below, between Park and Broadway on the west side.

Q. Now, Mr. Wilson, do you know Mr. Talbott's reputation in Butte for truth?

Counsel for defendants object to this question upon the same ground as stated in the objection to the preceding interrogatories.

A. It is no good.

Counsel for defendants move to strike out the answer of the witness upon the same ground as stated in the motion to strike out the answer to the preceding interrogatories.

Q. You do know it? A. Yes, sir.

Q. What is Mr. James A. Talbott's reputation in Butte for truth?

Counsel for defendants object to this question upon the same ground as stated in the objection to the preceding interrogatories.

A. It is bad; very bad.

Counsel for defendants move to strike out the answer of the witness upon the same ground as stated in the motion to strike out the preceding answers.

Q. Mr. Wilson, do you know what Mr. Talbott's reputation was in 1894 for truth?

Counsel for defendants object to this question upon the

same ground as stated in the objections to the preceding interrogatories.

A. Yes, sir.

Q. What was Mr. Talbott's reputation in the year 1894 for truth?

Counsel for defendants object to this question upon the same ground as stated in the objection to the preceding interrogatories.

A. Bad.

Counsel for defendants move to strike out the answer of the witness upon the same ground as stated in the motion tos trike out the preceding answers.

(By Counsel for Complainant.) Now, Mr. Wilson, if you will pause after I ask questions, in order to give the counsel for defendants an opportunity to make an objection, it will probably facilitate matters, although counsel for complainant has already stipulated that the same objection may be had to every question, and the same motion to strike out made as to every answer, but in order not to confuse the Examiner, I suggest that after complainant's counsel puts the question, that you wait in order to give the defendant's counsel an opportunity to make the same objection each time, in order to encumber the record, and after the counsel has entirely ceased, then with due precautions you answer the questions, that being the suggestion I make to the witness in the presence of counsel and the Court.

Q. Do you know the reputation of James A. Talbott in Butte, where he resides, for honesty and integrity.

Counsel for defendants object to this question upon the same ground as stated in the objection to the preceding interrogatories.

A. Yes, sir.

Counsel for defendants move to strike out the answer of the witness upon the same ground as stated in the motion to strike out the preceding answers.

Q. What is that reputation, good or bad?

Counsel for defendants object to this question upon the same ground as stated in the objection to the preceding interrogatory.

A. Bad.

Counsel for defendants move to strike out this answer upon the same ground as stated in the motion to strike out the preceding answers.

Q. Mr. Wilson, do you know the reputation of James A. Talbott, vice-president of the First National Bank of Butte, and former gambler in the year 1894, in Butte for honesty and integrity?

Counsel for defendants object to this question upon the same ground as stated in the objection to the preceding interrogatories, and further, upon the ground that it is an endeavor upon the part of counsel to cast a slur upon the character of Talbott by designating him in the question as a gambler.

Counsel for complainant rejoins that the defendants in their own evidence have produced a witness, to wit, E. Warren Toole, counselor at law, who has stated, being the defendants' witness, that Mr. Talbott was a gambler, and that therefore counsel for complainant assumes that defendants' evidence is true and predicating facts upon which they have asked the previous question.

Counsel for defendants move to strike out all of the statement of complainant's counsel in regard to this mat-

ter as immaterial and irrelevant having nothing whatever to do with the case, and as a repeated statement of matters claimed to be in evidenece which are not correct, and to all of which record taken by the Examiner is the best evidence, and also as being an argument which is entirely unnecessary and encumbers the record.

A. Yes, sir.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. What was the reputation of James A. Talbott in the year 1894 in the city of Butte, where he resided, for honesty and integrity?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding question.

A. Bad.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Cross-Examination.

(By Mr. SCALLON.)

Q. Mr. Wilson, when did you fall out with Mr. Talbott?

A. Well, I brought suit against him two years ago.

Q. When did you fall out with him?

A. That is about the time we had the general falling out.

Q. Since that time you have had pretty bitter feelings against him? A. Yes, sir.

Q. Have now?

A. I have now; yes, sir. I know he treated me dishonestly.

Q. About a week or so ago, in Ernest Lange's saloon in Butte City, did you speak about Mr. Talbott and say concerning him some very vile and opprobrious epithets?

Counsel for complainant objects to the question upon the ground that it is immaterial and irrelevant and that the question as to whether epithets were vile and opprobrious are questions of law and not of fact, questions as to the construction of the English language, and therefore the question is ambiguous, and the witness is not required to answer unless made more definite.

A. Well, we were drinking in there. I guess I used some pretty tough language; what it was I do not know. I know I could not make it tough enough.

Q. To suit yourself?

A. Webster's unabridged would just about fill the bill, if I could reach it. We were drinking and I was full.

Q. You might not find the same things in Webster's?

A. No doubt, I know I used very tough language. Mr. Talbott was not there; Mr. Davis was in there.

Q. How long have you been in Montana, Mr. Wilson?

A. About thirty odd years—thirty-three years.

Q. Will you please detail what occupation you have been in during that time?

A. My principal occupation has been mining before I came to Montana, and since I have been here, but I have gambled considerable.

Q. Run a gambling-house yourself? A. Yes.

Q. Several places? A. Deer Lodge.

Q. Where else? A. Butte.

Q. How long did you run a gambling-house?

A. I could not tell you how many years—several years.

Q. Did you many years?

A. I run a house here pretty nearly ten months; sold it and built the Clipper mill.

Q. About what time did you run gambling-houses?

A. It was in '70; I forget exactly the year—'70 or '71, anyhow.

Q. Did you ever see girls in your saloon or gambling-house?

A. No sir; I never seen them unless some respectable woman came in to buy a bottle of wine.

Q. The women who drank wine in your saloon were respectable?

A. They were, yes, sir; they would be on a visit going about two or three o'clock in the morning, going to Helena; they had to go by stage and dropped in there.

Q. Well, they kept pretty good hours?

A. They did not belong to the "bad lands."

Counsel for complainant objects to counsel for defendants stating that they kept pretty good hours, upon the ground that the counsel for complainant having noknowledge of the proper hours, and counsel for defendants assuming to know what are the proper hours, the interpolation of counsel for defendants is improper upon the records; in view of the fact that there is no proof upon which the question is predicated.

Q. What kind of games did you run in the gambling-house that you kept?

A. Faro-bank, principal game.

Q. What other games?

A. I do not know of any other. I never dealt anything but faro-bank and very little of that; sometimes twenty-one. But there were square games. Gambling is different now to what it was then.

Q. You say you are mining?

A. I have been mining for thirty odd years forty years, I guess.

Q. What properties, if any, do you own?

A. Where, here?

Q. Yes, sir. A. In Montana?

Q. Yes.

A. Well, I have owned quite a number here, I own some ground here on the Original. I mine there to the Five Hundred. I own in the North Star and Salisbury, the Big Bonanza, Black Warrior, and half a dozen other claims; I cannot think of their names.

Q. That you own in now?

A. I own in them now. I control interests in the Big Bonanza now. I have got charge of it, and have been operating it for a number of years as you know.

Q. But you don't own anything?

A. Not legally, myself.

Q. In whose name? A. My daughter's.

Q. That is the only property you have left?

A. No, sir.

Q. I asked you what properties you own now in Montana?

A. I think I own in the Black Warrior ground.

Q. Where is that?

A. Summit Valley mining district.

Q. Whereabouts?

A. Back of Walkerville, northwest.

Q. How far?

A. I have not measured it; about a mile, I guess.

Q. Is that in your name or somebody else's name?

A. It is in my name.

Q. Are you sure? A. I think it is in my name.

Q. Now, Mr. Wilson, will you please state what your own reputation is in Butte for honesty and integrity?

A. I have always been—I have always paid my debts when I had the money. A man is always in debt. I am considerably in debt. When I had the money I would pay my debts, and my reputation is good; nobody never told me different, unless he was a fake of the worst kind.

Q. Will you please state what your own reputation is for truth and veracity in Butte?

A. Of course I say it is good; never had anybody say it was not good, you or anybody else.

Q. Never heard it questioned?

A. No, sir. I had millions of money, maybe, in this community and paid every obligation that I ever owed in my life when I had the means. That is the first thing I done; that is my record here.

Q. Mr. Wilson, do you consider that you are entitled to rank as a man of truth, honesty, and integrity in spite of the fact that you kept a gambling-house?

A. Yes, sir.

Cross-Examination.

(By Mr. JOHN F. FORBIS.)

Q. Mr. Wilson, were you ever connected with Mr. Talbott in any of his gambling-houses? A. Yes, sir.

Q. You were a partner with him? A. Yes, sir.

Q. Where? A. In Deer Lodge.

Q. Whenever he run a gambling-house there you were in partnership with him?

A. Yes, sir; at one time.

Q. That was the same character of a gambling-house he ran afterwards? A. That he ran; yes, sir.

Q. The same character?

A. The same exactly in Deer Lodge; they were very similar.

Q. Is it not a fact that that was a first-class gambling-house?

A. Square gambling at that time, both of them; that is, in my house, anyhow, it was square.

Q. So far as you know Mr. Talbott's house was square.

A. You are speaking now of Deer Lodge?

Q. Yes, sir.

A. The faro games may be on the square, but the other games may have been dishonest. It was not done in my house if they came in to rob me, beat me out of thousands of dollars—the gambling, faro-table, was all right, I guess.

Q. Mr. Talbott was connected in the early days here with the most respectable gambling-house in Butte?

A. One of them; yes, sir.

Q. Was it not the most respectable at the time he was in it?

A. It was one of the most, it was a very respectable house, as far as that is concerned.

Q. It was as good as any of them—everything was on the square? A. Oh, yes.

Q. That was in Butte? A. Yes, sir.

Q. In 1876 Mr. Talbott ceased gambling, didn't he, or about that time—'77, somewhere along there?

A. I think not; he may have been out, possibly, I know he was connected with that house. I have seen him in the house frequently in '76, possibly '77, for all I know.

Q. Do you know that Mr. Talbott then went into business with Andrew J. Davis, deceased, and continued with him up to the time of his death as a confidential man?

A. I know he was engaged with Mr. Davis for some time in mining deals, him and Leary and the other partners, but what time it took place I do not know, somewhere about that time—'77, possibly.

Q. Don't you know that after Leary and Downs and Jones all got out, Talbott still remained with Davis up to the time of his death?

A. It is the only time I know directly he was ever engaged with him, after they worked the other fellows out —Leary and Downs and Jones.

Q. Do you know that he remained as the confidential man of Andrew J. Davis, deceased, up to the time of his death?

A. I know that he has been a very confidential man with him.

Q. In mining matters? A. Yes.

Q. And that he did not gamble after that time?

A. I never seen him gamble after that.

Q. At the time that Mr. Talbott ran a gambling-house here gambling was a legitimate business authorized by the law of the State licensed, was it not?

Counsel for complainant objects to this question upon the ground that the witness has not been proved a qualified expert on the laws and statutes of Montana, or the Territory of Montana, as organized under the laws of the United States, and that the question is therefore incompetent, irrelevant and immaterial, and the witness is not required to answer, and counsel for complainant states to the witness that if he chooses he can refuse to answer upon the ground of no knowledge.

Counsel for defendants object to counsel for complainant instructing the witness in regard to his answer, and in regard as to whether he shall answer or not.

A. Yes, sir.

Q. You know it was?

A. That we paid regular gambling license and done business with the territory. Gambling was run openly; there was no secret. Not unless you make a secret business out of it to bunco some people, which was frequently done.

Q. But gambling in itself was openly conducted?

A. Yes, sir.

Q. Mr. Wilson, in 1870 and 1872 you say Mr. Talbott conducted a gambling-house in Deer Lodge?

A. I think he ran a gambling-house there until '70, until he left to come to Butte.

Q. You say you saw Mr. Toole gambling in his house?

A. Yes, sir.

Q. Was that your house also?

A. It was in Talbott's own house.

Q. Who was in connection with Talbott?

A. I think Dan Floweree was. I do not know; you can hear these things; supposed to be two or three more.

Q. Was not the house known by the name rather than Talbott's gambling-house?

A. I do not believe the house ever had any name.

Q. What was it called?

A. Generally called Talbott's; he was the only man; he carried the business on. I think Dan Floweree was one and Nat Thompson; he lived in Salt Lake; happened to be in Deer Lodge that Summer.

Q. You saw Mr. Toole there then?

A. Yes, sir.

Q. Mr. Toole resided in Helena?

A. He would be over during the term of court.

Q. During these terms of court there would be quite a crowd of people there, would there not?

A. Yes, sir.

Q. There were several houses there?

A. Yes, sir.

Q. How many gambling-houses were running?

A. I do not know of any except possibly my own and Talbott's.

Q. Was not Dennisson and Craberry running there at that time? A. Yes, sir, I believe it was.

Q. And were they all running almost adjoining each other?

A. About on the same row. You know where they were just as well as I do.

Q. Now, when court met in Deer Lodge during those times there was quite a crowd there?

A. There was no doubt about that.

Q. These houses were always full?

A. Yes, sir; for a few days anyhow.

Q. Was it during these rushes that you saw Mr. Toole gambling in that house?

A. Oh, yes; when he was over there on court business.

Q. Do you know whether he knew it was Talbott's house? A. Of course he knew it.

Q. How do you know?

A. He was running the house, tending bar sometimes, dealing sometimes, in the look-out chair sometimes, any farther than that of course, the presumption is he knew the house. If I am behind the bar taking care of my business, the presumption is that it is my place.

Q. You sometimes hire barkeepers?

A. Yes, sir; always.

Q. Look-outs?

A. Yes; barkeepers, faro-dealers, look-outs and swampers.

Q. Cappers?

A. Well, we didn't have to have cappers in them days that they have now.

Q. Mr. Toole, although residing in Helena, was pretty generally at these terms of court in Deer Lodge?

A. Always.

Q. He was a very prominent attorney in Montana at that time?

A. One of the most prominent legal lights in the territory.

Q. Was he not considered the leading?

A. He was considered one of the leading. There was other gentlemen there, Mr. Claggett and Mr. Dixon in the same category.

Q. Has he maintained that reputation ever since?

A. I think he has, so far as I know him; of course there is more of them now, and there is between five and thirty other people here that are probably equal to Mr. Toole.

Q. Well, but at that time?

A. He was considered really the best in the territory at that time.

Redirect Examination.

(By Mr. DEMOND.)

Q. You were first asked when you fell out with Jim Talbott; I think you answered but did not state why. Will you please state why you fell out with Jim Talbott?

Counsel for defendants object to this question upon the ground that it is immaterial and irrelevant, and not proper testimony in rebuttal, or relating to anything brought out by defendants in their testimony, and is not in support of any of the allegations in the complaint, and generally incompetent and not proper re-examination.

A. Well, he owed me rent for that gambling-house in Deer Lodge. I let it run about twenty-one years, and never did anything until he got outlawed. I thought he would pay me and a couple of years ago I wrote him a letter, but he paid no attention to it. I sent it in care of the bank. I afterwards instructed Mr. Campbell to bring suit. He never paid any attention, never paid me a cent from that time until now. I entered suit and he plead

the statute of limitations against me two years ago last May, at the city of Butte.

Counsel for defendants move to strike out all of the answer of the witness upon the ground that it is immaterial and irrelevant and not proper testimony in rebuttal, or in support of any of the allegations in the complaint, and not proper re-examination.

Q. You do not call that a square deal, do you, Mr. Wilson, between you and Mr. Talbott?

Counsel for defendants object to this question as calling, not for a fact, but for the opinion of the witness, and also as leading, and also upon the grounds stated in the objection to the foregoing question.

A. No, sir; it is a very dishonest deal.

Counsel for defendants move to strike out the answer of the witness upon the grounds stated in the motion to strike out the preceding answer.

Q. Now, you were asked on cross-examination about being in Lange's saloon in Butte a week or so ago, and stating something about using tough language about James A. Talbott, and I think you stated that Andrew J. Davis, Jr., was in the saloon at that time. Now, will you please state to me all that you remember that occurred on that occasion?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding question.

A. Mr. Davis apparently came in after I had been in there for some time—drinking, had four or five whiskies, cock-tails or anything we wanted—and it seems Mr. Davis asked me to take a drink, and Jim Talbott's name came

into my mind at the monent. I do not know exactly what language I did use, but, as I said before, I could not get too tough. The barkeeper, John Whalen, talked to me and him and we had some words. I do not remember distinctly of seeing Mr. Davis pass out in the arms of somebody else, I think Mr. Benham; my buggy was in front of the door, and I jumped in my buggy and went up to the mine—no, I did not; my horse ran away and broke a wheel.

Counsel for defendants move to strike out this answer upon the same grounds stated in the motion to strike out the preceding answer.

Q. You spoke about the mine; you are living on the Big Bonanza mine now?

A. Sometimes; yes, sir.

Q. You say that Andrew J. Davis, Jr., president of the First National Bank of Butte was in Lange's saloon and drinking?

Counsel for defendants object to the foregoing question, upon the grounds stated in the objection to the preceding question, and also upon the ground that it is leading, and assumes facts which are improper to be assumed by counsel in propounding questions to the witness.

A. Yes, sir; they were at the bar together.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding testimony.

Q. Do I understand you that you saw Mr. Andrew J. Davis, Jr., being moved out by this man Benham, the bartender?

Counsel for defendants object to this question for the

same reasons stated in the objection to the preceding interrogatories.

A. No, sir; he is not the bartender. I think Mr. Benham had hold of him by the arm, walking about as a friend would do; that is the way I understand it.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. You were asked about being in partnership with Talbott. Just tell me where and when that was.

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding question.

A. In Deer Lodge, in 1870.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. For how long?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding question.

A. He was with me about five or six months, I guess.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. You have been in mining, I understand you, quite considerably in Montana, Mr. Wilson?

A. Principally mining all my life, before I came here. I did not say with gold—placer and quartz.

Q. Have you owned valuable mining properties in the State of Montana, from time to time.

Counsel for defendants object to this question upon the grounds stated in the objection to the foregoing interrogatory and as calling not for facts but for a matter of opinion. A. Yes, sir.

Counsel for defendants move to strike out the answer of the witness on the ground stated in the motion to strike out the preceding answer.

Q. Now, you have been asked about the games that you and Mr. Talbott used to run together; have you not known, as a matter of fact, that some of Mr. Talbott's games after you quit him were not run on the square?

Counsel for defendants object to this question upon the same grounds stated in the objection to the foregoing interrogatories, and also upon the ground that the question is suggestive and leading.

A. Well, I could not positively say that the faro-banks were brace games. Gambling at that time was all supposed to be on the square, but I think his games were on the square.

Q. When you were with him also?

A. Yes, sir; also when we went to the other house.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. How about before you were with him?

Counsel for defendants object to this question upon the same grounds stated in the objection to the foregoing question.

A. It is pretty tough—Madison county.

Counsel for defendants move to strike out this answer

upon the same grounds stated in the motion to strike out the preceding answer.

Q. You spoke about Madison county?

A. In Virginia, Nevada.

Q. I understand you to say that his games in Virginia City were pretty tough?

Counsel for defendants object to this question upon the same grounds stated in the objection to the foregoing question, and also upon the ground that the question is leading and suggestive and shows a continued determination of counsel to put words in the witness' mouth instead of leaving him to his own testimony.

A. Yes, sir; pretty tough.

Counsel for defendants move to strike out the answer of the witness upon the grounds stated in the motion to strike out the preceding answer.

Q. You were asked about lawyers coming down to Deer Lodge at the different terms of court and gambling in the houses there. Was it not quite universal with all the prominent lawyers of Montana to come there and gamble?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding question.

A. Yes, when I was there; all western men gambled with lawyers because there would be lots that had money.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. So that it was well known, was it not, in Deer

Lodge at that time, to almost all the lawyers that James A. Talbott was running a gambling-house there?

Counsel for defendants object to this question upon the grounds stated in the objection to the preceding question.

A. Why, of course.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. Now, Mr. Wilson, I want to ask you to give no names, but is it not true that some lawyers who are now prominent in Montana, leaving out Mr. Toole, used to go down to Deer Lodge and gamble?

Counsel for defendants object to this question upon the grounds stated in the objection to the preceding question.

A. Oh, yes.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. You mentioned a term, Mr. Wilson, I am not familiar with. I understood you to use the word "swamper"; will you please tell me what you mean by the word "swamper"?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding question, and also upon the ground that the purpose of this examination is not to enlighten the ignorance of counsel upon matters that have no relation directly or indirectly to this case.

A. A swamper generally does all the heavy work, such as cleaning the saloon and scrubbing, same as property man around a theater.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. You spoke about Mr. Toole being one of the prominent gentlemen who came down to Deer Lodge during the terms of court and mentioned Mr. Dixon as being another, and some other gentlemen; how often would they come down there?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding question.

A. Well, every time we would have a term of the District Court, and Mr. Dixon resided there.

Q. Is it not true Mr. Dixon was considered as much of a legal light there as Mr. E. Warren Toole?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding question, and also upon the ground that it is calling for comparisons, which are odious.

A. Well, in my opinion he was just about as bright as Mr. Toole; in fact, he was my choice of both of them, and he done some legal business for me.

Counsel for defendants moves to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer,

Q. There were a number of prominent gentlemen of Montana in town at that time?

Counsel for defendants object to this question upon the grounds stated in the objection to the foregoing question.

A. Yes, sir; quite a lot.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer,

Q. Do you know Col. Sanders?

Counsel for defendants object to this question upon the same grounds stated in the objection to the foregoing question.

A. Yes, sir.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. Did he live there then?

A. He resided in Helena; he came to Deer Lodge occasionally the same as the balance of them.

Q. He was in the same relation to Deer Lodge as the other gentlemen that came there?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding interrogatories.

A. The same; yes, sir.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer,

Cross-Examination.

(By Mr. SCALLON.)

Q. Now, have you stated all that took place in Lange's saloon?

A. Yes; I do not remember, however, what did take place there.

Q. Do you remember the winding up?

A. I know how I wound up; my mare ran away and broke my buggy a little while after that.

Q. Were you not ordered out of the saloon by the barkeeper? A. No, sir; not that I remember of.

Q. Don't you remember that you were ordered out on account of disorderly conduct?

A. No, sir; the barkeeper and me are personal friends, and besides I go there every time I come to town. I was never ordered out of any house on earth.

Q. Can you swear you were not ordered out?

A. I know Jack and me had some words.

Q. Jack was the barkeeper? A. Yes, sir.

Q. You had some words? A. Yes, sir.

Q. You cannot remember what they were?

A. I could not say positively. I might tell you some things; he always treated me like a gentleman and I said I always treated him the same way. The barkeeper's duty is to attend to his duty behind the bar, and I came in there and spent my money, but so far as being ordered out of his house is concerned, possibly he might have said something but I do not remember anything of the kind; never was ordered out in my life.

Q. What time of day was it?

A. After he goes on shift.

Q. What time of the day?

A. He goes on shift at five or six o'clock. I was in such a condition that I could not tell very well even if I had a watch on me.

Q. Do you remember whether Mr. Davis was in the saloon, or whether he came in after?

A. I think he came in after,

Q. Who was with him?

A. I could not remember his name.

Q. Do you remember Mr. Benham being there?

A. Yes, sir.

Q. Do you remember Mr. Benham inviting Mr. Davis to have a drink? A. Possibly, I know that—

Q. It was while you were at the bar taking this drink that you commenced talking about Mr. Talbott?

A. I do not believe I drank; possibly I might have. I know I intended to take a drink when this conversation came up.

Q. And that Mr. Davis went out almost immediately?

A. I do not think he stayed very long. I think he went out ahead of me.

Q. What do you mean by saying, Mr. Wilson, that you had seen Mr. Davis in that saloon drinking?

A. Well, he was at the bar.

Q. How many drinks did you see him take?

A. I do not know that I saw him take any. I presume when a man leans over the bar he is in there taking a drink; I presume he drinks some.

Q. You don't know whether he took a drink or not?

A. I do not.

Q. Well, what did he take, if anything?

A. I just presume that he was there at the bar.

Q. Do you know whether he took a cigar, lemonade, or whisky?

A. He might have taken every one. I know he was leaning over the end of the bar the same as I or anyone else would that wanted to take a drink; might not have taken anything.

Q. He went out with Mr. Benham?

A. I think they went out ahead of me. I think I saw him.

Q. At one time you stated he went out in the arms of Mr. Benham?

A. When you see men like that, I presume that is what you would call it.

Q. Then, again, you said he went out just as a friend?

A. Just as friends would naturally be.

Q. You do not mean to insinuate he was drunk?

A. Oh, no.

Q. Or that he had been indulging possibly in more than one social drink? A. That is all.

Q. So the insinuations come from you?

A. Which?

Q. Any insinuations against Mr. Davis did not come from you?

A. I would not insult Mr. Davis, but Talbott came into my mind, and I knew they were associating together.

Q. You let that claim of yours against Mr. Talbott run twenty-seven years?

A. I think it was about twenty-seven years two years ago; that would be twenty-nine now; that was including the first, it would be twenty-eight now.

Q. Did you know since that time Mr. Talbott has owned very valuable mining properties in Butte?

A. You could not collect a debt from Jim Talbott until the account was outlawed.

Q. Didn't you know, Mr. Wilson, that Mr. Talbott was a partner with Downs, Leary, and others in the Parrot claims up here in Butte?

A. I suppose they were partners; yes, sir.

Q. Didn't you know he was also a partner in what was called the Silver Bow Mining and Milling Company?

A. I suppose so.

Q. They were in a very large number of claims here?

A. Yes, sir.

Q. Didn't you know that they owned a number of claims called the Josephine and other claims on the Butte townsite?

A. That is correct; suppose he did own all these claims?

Q. So that during all of these years he had a lot of property in his name upon which a judgment might have been executed?

Counsel for complainant objects to this question upon the ground that the witness has not been qualified as register of deeds or as a lawyer learned in the law, nor has it been proved that he has studied the records of Silver Bow county to ascertain the title to real estate, and that the counsel is calling for testimony from the witness concerning which he has no personal knowledge whatsoever.

A. Well, I do not know. I never looked into the records of this county; presume he owned in all of these claims, but at that time my account was outlawed; the statute of limitations was set in.

Q. Why did you say on your re-examination that during all of this period he had nothing in his name?

Counsel for complanant objects to this question upon the ground that it assumes facts not testified to; the recollection of counsel is there is no such testimony, although he may be mistaken.

A. I have never looked into the county records to see if he owned the Josephine, Silver Bow Mill, or anything else, whether Downs owned them, Downs, Leary, or Jim Talbott; presume he owned into them as copartner.

Q. Will you please answer the question?

A. I mean by that he had nothing you could reach. I know he was badly involved; he was badly involved when he was constructing that Silver Bow mill.

Q. How long ago was that?

A. '67, '68, or '69. I know they were all badly involved—every one of them.

Q. He was in business right along after that, right here in Butte?

A. Yes, sir; he was associated with Mr. Davis in the bank.

Q. I mean in the mining business?

A. I do not know whether he was or not. Mr. Downs was manager then; boss man at the mines.

Q. After Mr. Davis went awy then Mr. Talbott managed the business?

A. He posed that way; posed as superintendent and manager. Talbott was no miner; never studied mining at all.

Cross-Examination.

(By Mr. JOHN F. FORBIS.)

Q. Haven't you borrowed money since that Mr. Talbott has indorsed for you?

A. Talbott indorsed for me—I do not think I have.

Q. Since '76, say?

A. I do not think he ever indorsed for me anywhere.

I do not think I needed it at that time. I borrowed money at the National Bank and paid interest on it—paid my obligations since.

Q. Talbott indorsed that for you?

A. No, sir; I do not think he did.

Redirect Examination.

(By Mr. DEMOND.)

Q. You say Andrew J. Davis, Jr., leaned over the bar at Lange's?

Counsel for defendants object to this question as immaterial and irrelevant and not proper evidence in rebuttal, and further that counsel for complainant has already examined this witness in chief and re-examined him, and as there must be some limit to the right of individual examination, defendants also object to any further re-examination of this witness; also the further objection that it is leading.

A. Yes, sir.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motions to strike out preceding answers.

Q. And you are not willing to swear whether he was buying his own drink or whether he was being treated, are you?

Counsel for defendants object to this question upon the same grounds stated in the objection to the foregoing question.

A. No, sir; I could not.

Counsel for defendants move to strike out the answer

of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. I understood you to say somebody was inviting him up for a drink?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding question.

A. Possibly he might have asked him to take a drink.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. In your last answer you stated that possibly "he" might have asked "him" to take a drink. Will you please state who you mean by "he" and who you mean by "him."

Counsel for defendants object to this question upon the same grounds stated in the objection to the foregoing answer.

A. Mr. Davis it was that was asked the question; there was Mr. Davis there and Mr. Benham, and it seems to me possibly two or three more.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. You have been asked if you did not think Mr. Talbott was interested in the Parrot and the Silver Bow and the Josephine claims; have you ever examined the records to determine whether Mr. Talbott was the owner of these?

Counsel for defendants object to this question upon the

same grounds stated in the objection to the preceding question.

A. No, sir.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. So when you speak of Mr. Talbott owning property, you really do not speak of your own knowledge, but as to what you believe?

Counsel for defendants object to this question upon the same grounds stated in the objection to the foregoing question, and for the further reason that it is leading and shows the determination of counsel to put words into the mouth of the witness instead of allowing him to answer the questions.

A. That is all.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. When you borrowed money of the First National Bank of Butte, as you spoke of, who did you see about it?

Counsel for defendants object to this question upon the grounds stated in the objection to the foregoing question.

A. Well, I generally put up security. Dr. Mussigbrod was on my note once, Jeoff Lavelle another time; both obligations were paid as soon as I made the first shipment of ore.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. What year was that?

*————————————————————

the grounds stated in the objection to the foregoing question.

A. That was away back a long time ago.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. Before Judge Davis' death?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding question.

A. Yes; I know a portion of that transaction was a long time before he died.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. When Mr. Talbott was engaged in the very early days in Virginia City up to the time he was in Butte in gambling-houses he was not doing very much mining, was he?

Counsel for defendants object to this question upon the same grounds stated in the objection to the preceding question. Counsel still persists in making his questions leading.

A. Well, no; he is not a practical miner.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Q. What do you mean by a practical miner?

---

*(The original transcript is here deficient.)

A. A man that can carry on work underground and understand how to put in timbers and protect his ground and keep it from falling on the people working for you.

Counsel for defendants move to strike out the answer of the witness upon the same grounds stated in the motion to strike out the preceding answer.

Cross-Examination.

(By Mr. JOHN F. FORBIS.)

Q. Don't you know that Talbott placer mined a great deal?

A. Yes; I know the ground he placer mined very well, John; might have done a little down below there, very little. I mean down below in Deer Lodge county.

Counsel for defendants now move to strike out all of the preceding testimony of the witness upon the ground that it is immaterial and irrelevant and incompetent, and not proper rebutting testimony, but testimony which, if admissible at all, should have been offered by complainant in opening her case; and further, upon the ground that said testimony is not responsive or in support of any of the allegations or charges in the complaint.

——————.

Subscribed and sworn to before me this —— day of ————, 1898.

——————,

Special Examiner.

And thereupon further hearing was continued until Friday, September 2d, 1898, at 10 o'clock A. M.

Friday, September 2d, 1898, 10 o'clock A. M.

Met pursuant to adjourment, and thereupon further hearing was continued Saturday, September 3d, at 10 o'clock A. M. Counsel for respective parties present as before.

Saturday, September 3d, 1898, 10 o'clock A. M.

Met pursuant to adjournment. Counsel for the respective parties present as before. And thereupon further hearing was continued until Tuesday, September 6th, at 2 o'clock P. M.

Tuesday, September 6th, 1898, 2 o'clock P. M.

Met pursuant to adjournment. Counsel for respective parties present as before. And thereupon further hearing was continued until Wednesday, September 7th, 1898, at 2 o'clock P. M.

Wednesday, September 7th, 1898, 2 o'clock P. M.

Met pursuant to adjournment. Counsel for respective parties present as before. And thereupon further hearing was continued until Thursday, September 8th, 1898, at 2 o'clock P. M.

Friday, September 8th, 1898, 2 P. M.

Met pursuant to adjournment. Counsel for the respective parties present as before. Thereupon further hearing was continued until Friday, September 9, 1898, at 10.30 A. M.

Friday, September 9th, 10.30 A. M.

Met pursuant to adjournment. Counsel for the respective parties present as before, and thereupon the following proceedings were had:

G. W. STAPLETON, a witness called on behalf of the complainants, being duly sworn, testified as follows:

Direct Examination.

(By Mr. DRENNAN.)

Q. You may state your name.

A. George W. Stapleton.

Q. You have testified before in this case?

A. Yes.

Q. Been away from Butte, have you, since you testified last? A. In Salt Lake three weeks.

Q. When did you return?

A. I returned the day before yesterday.

Q. I want to call your attention, Mr. Stapleton, to part of the testimony of the witness N. W. McConnell in the records of defendants' evidence as shown on pages 12 and 13. And thereupon Mr. Drennan read the said testimony, as follows:

"Q. Did you ever have any talk with Judge Stapleton about statements made to him by Mr. Darnold?

A. I did.

Q. State what that was, please.

(Objected to by counsel for complainant as hearsay.)

A. On the same day that I came over here in connection with that affidavit, I had been told by Mr. Boyce that Darnold had made the same statements to him that he had made to me and had made in the affidavit, and I went to Mr. Stapleton's office and asked him about it. He told me he had made substantially the same statements as were in the affidavit, and I asked him to make

an affidavit to that effect, that we might use it on the motion for a rehearing, on the motion for a new trial. I rather insisted on it, but he refused to do it.

Q. Did Mr. Stapleton give any reasons for not making the affidavit? A. Yes, sir.

Q. What were those reasons?

(Same objection by counsel for complainant.)

A. I am not able to state those reasons very clearly. My recollection is that he felt he had not been treated right exactly by the contestants in that will case that were represented in relation to employment in it. I am not able to give you the particulars as to what he said.

Q. Did he say anything about the matter being unprofessional, for an attorney to make affidavits of such matters?

(Objected to by counsel for complainant as being clearly leading and improper.)

A. I do not know that he said it in that way, I think he made some objection upon the ground of being talked to as an attorney. He did not like to make affidavits as to matters that had been said to him. I was given the impression that he did not feel altogether kindly to our clients—that is, the heirs that we represented. I may be mistaken about that. I am not positive about that."

Q. I will ask you, Mr. Stapleton, if Judge McConnell asked you to make such an affidavit as referred to in his testimony of what the witness Darnold said, etc.

A. My recollection is that Warren Toole and Judge McConnell came to my office and asked me to make an affidavit of what Darnold said to me.

Q. What have you to say as to Judge McConnell's version of the matter as given in his testimony read above—is it correct?

A. Judge McConnell is very much mistaken about that. I had no feeling in the matter at all. I never thought at any time that I had any right to be employed if they did not see fit to employ me, or thought anything about it, and when they asked me to make an affidavit I never took that into consideration, and I have no unkind feelings of any nature or description against the clients they represented, and that was not the reason that I did not make the affidavit. The real reason I did not make that affidavit was this: As I have already testified in this case, Mr. Boyce and Mr. Darnold came to me at my room in the Butte Hotel; he wanted to make this affidavit stating that his evidence was false that he had given in that case, and I did not feel at liberty to have anything to do with it because I was not an attorney in the case. I sent him to Mr. Toole and Judge McConnell at Helena, and told him they were the proper parties, and that when I had done that I had certainly done my duty in the matter, having nothing to do with it, and I was told—I understood that Judge McConnell, when he went there had told him he was liable to be prosecuted for perjury because he testified in two opposite ways, but I took a different version of the law, and thought Judge McConnell was mistaken about the law. I was also told he had given Mr. Darnold some paper whereby he was to be protected from the consequences of having made this affidavit, thereby preventing—putting himself in the position that he could not use this testimony. I did not feel

it my duty when he had put himself in that shape to have anything to do with it at all. I felt I had done my full duty when I sent them to Mr. Toole and Judge McConnell, who were the attorneys in the case.

Q. Did you state to Judge McConnell that you were not treated right by the contestants in the will case?

A. I certainly did not, nor to anyone else. I never felt that I was not treated right.

Q. Did you state to him that you did not feel kindly towards his clients?

A. Nothing of the sort. I not only did not state it, but I had no idea of the kind.

Cross-Examination.

(By Mr. DIXON.)

Q. Did you not, Mr. Stapleton, refuse to make the affidavit? A. Yes.

Q. And you did not make it?

A. No; I made no affidavit.

Q. Although Judge McConnell had requested you to?

A. Judge McConnell and Warren Toole came to the office—

Q. Both of them, and asked you to make it?

A. They came to the office and asked me to make it.

Q. But you refused and did not?

A. That is it.

Q. Did they state to you the reasons why they wanted you to make the affidavit?

A. Well, I do not remember that they did; they might have done so, but I do not remember: I really do not remember whether they did or not.

Q. Did they state to you that they had Darnold's affidavit in their possession at the time?

A. My impression is that they did.

Q. Did they state to you that Darnold had made an affidavit at that time? A. Yes; I think so.

——————.

Subscribed and sworn to before me this —— day of ————, 1898.

——————,
Special Examiner.

And thereupon the hearing was adjourned until 2:30 P. M.

2:30 P. M.

Met pursuant to adjournment. Counsel for the respective parties present as before, and thereupon counsel for complainant stated that complainant closed her testimony in rebuttal.

Defendants' Exhibit, "Affidavit and Notice."

(August 30th, 1898. C. W. B., Special Examiner.)

In the Circuit Court of the United States, District of Montana.

IN EQUITY.

HARRIET WOOD,
Complainant,
vs.
ANDREW J. DAVIS, Jr., et al.,
Defendants.
No. 58.

The complainant in the above-named suit and her solicitors, Messrs. W. S. Logan and C. P. Drennen, are hereby notified that defendants have filed with Charles W. Blair, Special Examiner, to take testimony in said suit, the affidavit of W. W. Dixon, a copy of which is herewith served upon you, and will thereupon proceed, on the 6th day of September, 1898, at 10 o'clock A. M., or so soon thereafter as may be practicable, to take before said Special Examiner the testimony upon the part of defendants in said suit, of Wilbur F. Sanders and John B. Clayberg, the witness mentioned in said affidavit, at the United States courtroom in Butte, Silver Bow county, Montana. You are invited to be present and cross-examine said witnesses, if you desire. The examination

will be adjourned from time to time as required without further notice. If you prefer and consent, defendants will proceed to take said testimony at once, and before you commence any examination of your witnesses in rebuttal, or you may proceed if you desire with your rebutting testimony. In either case defendants offer to stipulate for such reasonable extension of time to you to introduce rebutting testimony on your part after defendants have taken the testimony of their said witnesses above mentioned, as may be necessary and proper.

Dated this 30th day of August, 1898.

FORBIS & FORBIS and
W. W. DIXON,
Solicitors for A. J. Davis and First National Bank.

WM. SCALLON and
JOHN W. COTTER,
Solicitors for J. A. Talbott, Admr., and J. H. Leyson, Admr.

E. N. HARWOOD,
Solicitor for John E. Davis, Admr.

Service of copy of foregoing notice and affidavit referred to admitted at Butte, Montana this 30th day of August, 1898.

W. S. LOGAN and
C. P. DRENNAN,
Solicitors for Complainant.

In the United States Circuit Court, District of Montana.

IN EQUITY.

HARRIET WOOD,
Complainant,
vs.
ANDREW J. DAVIS, Jr., et al.,
Defendants.
No. 58.

In the Matter of Testimony before Charles W. Blair, Special Examiner.

State of Montana,
County of Silver Bow. } ss.

William W. Dixon, of lawful age, being duly sworn, says that he is one of the attorneys and counsel of Andrew J. Davis, Jr., and the First National Bank of Butte, defendants in the above-entitled suit; that Wilbur F. Sanders and John B. Clayberg are necessary and material witnesses for defendants in said suit; that both of said witnesses reside in the State of Montana but departed from said State, as affiant is informed and believes, on account of ill-health, before the commencement of the time fixed for defendants to introduce their testimony, but expected to return to Montana some time ago; that said Sanders did not return to Montana until a few days ago, and said Clayberg has not yet returned, but will probably return within a few days; that said

witnesses, as affiant is informed and believes, have during their said absence been seriously ill and unable most of the time to attend to business; that defendants believed they would return to Montana in time to give their evidence if required in this suit, but they did not do so, and defendants' time for taking testimony expired before the return of either of them; that the Judge of the Court in which this suit is pending is not willing to act or make any order in this suit, as he considers himself disqualified, and there is no other qualified Judge in Montana or to whom defendants could or can now apply to extend the time to take the testimony of said witnesses.

Wherefore, defendants ask to take the testimony of said above-named witnesses before the Special Examiner at this time or upon such reasonable notice as the Examiner may prescribe, complainant having as yet introduced no testimony in rebuttal on her part—and offer to stipulate, if this be done, to extend for any reasonable period the time allowed complainant to put in her rebutting testimony, so that she may not be injured or delayed. This taking of said testimony is not asked for delay, but in good faith, and defendants ask that, if necessary, an order of Court be hereafter made nunc pro tunc allowing the taking of the testimony of said witnesses for defendants at this time.

W. W. DIXON.

Subscribed and sworn to before me this 30th day of Aug., A. D. 1898. GEO. W. SPROULE,

[Seal] Clerk.

By Charles W. Blair,

Deputy Clerk.

Complainant's Exhibit, "Judiciary Bill."

(Aug. 30, 1898. C. W. B., Special Examiner.)

SENATE BILL, No. 99.

A bill for an act to increase the number of justices of the Supreme Court for the two years next ending.

Be it enacted by the Legislative Assembly of the State of Montana:

Section I. There are hereby created the offices of two additional Justices of the Supreme Court of the State of Montana, so that the number of Justices of said Supreme Court shall be five during the term hereinafter mentioned. The additional Justices of the Supreme Court hereby created shall be vested with all the powers, duties and authorities now provided generally for Justices of the Supreme Court by virtue of the Constitution and laws of this State.

Section II. The term of office of the additional Justices of the Supreme Court, except as by this act is otherwise provided, shall continue and be until the 1st day of July, 1897.

Section III. The salary of said Justices shall be the sum of four thousand ($4,000.00) dollars per annum, payable quarterly, as is now provided by law.

Section IV. The offices of two Associate Justices of the Supreme Court created by this act are hereby declared to be vacant, to be filled by nomination of the Governor, by and with the consent of the Senate, as is now provided by the Constitution and laws of this State.

Section V. This act shall take effect and be in force from and after its passage.

[Endorsed]: A bill for an act to increase the number of Justices of the Supreme Court for the two years next ending. 1895. Mch. 4. Rean. one and two times and refd. to the Com. on Judiciary. Surrendered by Com. after adjournment. Introduced by Eggleston.

United States of America,
State of Montana.

I, T. S. Hogan, Secretary of State of the State of Montana, do hereby certify that the above is, with the exceptions of corrections in orthography and punctuation and insertion of omissions or substitute words in brackets, a true and correct copy of an act entitled "Bill for an act to increase the number of Justices of the Supreme Court, for the two years next ensuing," at the Fourth Session of the Legislative Assembly of the State of Montana.

In testimony whereof, I have hereunto set my hand and affixed the Great Seal of said State.

Done at Helena, the capital of said State, this twenty-seventh day of August, A. D. 1898.

[Seal] T. S. HOGAN,
Secretary of State.

Complainant's Exhibit, "Judiciary Bill."

(Aug. 30, 1898. C. W. B., Special Examiner.)

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A bill for an act to increase the number of justices of the Supreme Court for the two years next ending.

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In testimony whereof, I have hereunto set my hand and affixed the Great Seal of said State.

Done at Helena, the capital of said State, this twenty-seventh day of August, A. D. 1898.

[Seal] T. S. HOGAN,
Secretary of State.

Certificate of Special Examiner.

I, Charles W. Blair, Special Examiner, do hereby certify that the foregoing testimony was taken down stenographically and by me reduced to writing, in the presence of and from the statements of the witnesses at the times and places designated therein; and the witnesses were by me, before testifying, duly sworn to testify to the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause.

That in accordance with the stipulation of the counsel herein, as shown on page 40 of the second volume of this testimony, I have signed the names of the witnesses hereto, with the exception of the signature of the witness James R. Boyce, Jr., whose testimony was read over to the witness by me and by him subscribed in my presence.

I further certify that all corrections, interlineations, additions, or erasures in the within depositions were made in each and every case, prior to the signing thereof by me on behalf of the witnesses, and in the case of the witness Boyce, prior to the signing thereof by him.

In witness whereof I have hereunto affixed by signature this 29th day of September, A. D. 1898.

CHARLES W. BLAIR,
Special Examiner.

Complainant's Exhibit, "Notice of Taking Testimony."

Circuit Court of the United States, for the District of Montana.

IN EQUITY.

HARRIET WOOD,
Complainant,
vs.
ANDREW J. DAVIS, Jr., et al.,
Defendants.

Please take notice that we shall proceed to take proofs for final hearing on the part of the Complainant, on the issues raised by the plea and answers under the 67th rule of the Supreme Court for courts of equity, as amended, and in accordance with the statutes in such cases made and provided, and in pursuance of the rules and practice of this court, before Charles W. Blair, Esq., Special Examiner of this court, under said statutes and rules, at the United States courtroom, in the Postoffice Building at Butte, Montana, as ordered by him on the 21st day of June, 1898, at 10 o'clock in the forenoon.

We desire the evidence to be adduced in this cause to be taken orally.

You are invited to attend and cross-examine the witnesses produced. The examination will be adjourned to

such time and place as may be required, without further notice.

Dated March 15th, 1898.

Very respectfully,
WALTER S. LOGAN, and
C. P. DRENNEN,
Complainant's Solicitors.

To W. W. DIXON, FORBIS & FORBIS, Wm. SCALLON, J, W. COTTER, E. N. HARWOOD, Defendants' Solicitors.

[Endorsed]: No. 58. Harriet Wood vs. A. J. Davis, et al. Notice of taking testimony. June 21, 1898. C. W. B., Special Examiner. United States Circuit Court, District of Montana. In Equity. Harriet Wood vs. Andrew J. Davis, et al. Notice of taking testimony. W. S. Logan & C. P. Drennen, solicitors for complainant. To W. W. Dixon, etc., Solicitors for defendants. Due and timely service of the within notice is hereby admitted, this 15th day of June, 1898. Wm. Scallon, Solicitor for Talbott & Leyson. James W. Forbis, attorney for A. J. Davis, Jr., and the First National Bank. E. N. Harwood, solicitor for John E. Davis, administrator of the estate of John A. Davis, deceased.

Complainant's Exhibit, "Will of A. J. Davis."

Know all men by these presents that I, A. J. Davis, of the county of van Buren & State of Iowa, being in good health & of sound & desposing mind & memory do make & publish this my last will & testament & as to my worldy estate & all the property real personal

and mixed of which I shal die seized & Possessed or to which I shal be entitled at the time of my decease, I devise, bequeath and dispose thereof in the manner following, to wit.

My will is that I guive & bequeath to Thomas Jefferson Davis & Pet Davis & her mother Miss Bergett, all three of Van Buren Co., Iowa, a life time mantainance. That is to say they shal have the necessaries of life out of my estate during their natural life. This amount of annuity to be set apart by my executors hereinafter named & the judgment of my executors as to the amount necessary to set apart for the support of the above named persons shal be final.

sec. I guive devise & bequeath to my beloved brother, John A Davis reversion or remainder of my property wherther real personal or mixed to have and to hold the same forever together with all the profits & income thereof to the said John A. Davis, his heirs, administrator or assigns to his & their use & benefit forever

Third. And lastly I do nominate and appoint James Davis & Job Davis of Davis County, & State of Iowa to be the executors of this my last will and testament.

In testimony whereof I, the said A. J. Davis have to this my last will & testament contained on one sheet of paper, I have subscribed my name & affixed my seal this the twentieth day of July ———— in the year of our Lord one thousand eight hundred & sixty-six (1866)

A. J. DAVIS.

Signed, sealed published and delivered by the said A. J. Davis as & for his last will and testament in the

presence of us who at his request and in his presence & in the presence of each other have subscribed our names as witnesses thereto.

Witnessed.

J. C. SCONCE.
JAMES DAVIS.
JOB DAVIS.

Filed Mar. 27, 1895. H. A. Niedenhofen, Clerk. By C. V. Henderson, Deputy.

Filed Jul. 24, 1890. Will L. Clerk, Clerk. By P. W. Irvine, Deputy Clerk.

State of Montana, }
County of Silver Bow. } ss.

I, Clinton C. Clark, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, hereby certify, that the above and foregoing is a full, true and correct copy of the last will and testament of A. J. Davis, deceased, as the same appears of record at pages 142 and 143 of Probate Miscellaneous Record "E," records of said Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this fifteenth day of June, A. D. 1898.

————————,
Clerk,

By ————————
Deputy Clerk.

Complainant's Exhibit, "Certificate to Probate of Will."

Second Judicial District Court, State of Montana, Silver Bow County.

In the Matter of the Estate of
ANDREW J. DAVIS, Deceased. }

State of Montana,
County of Silver Bow. } ss.

I, John J. McHatton, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, do hereby certify that on the twenty-seventh day of March, A. D. 1895, the annexed instrument was admitted to probate as the last will and testament of Andrew J. Davis, deceased; and from the proofs taken and the examinations had therein the said Court finds as follows:

That Andrew J. Davis died on or about the eleventh day of March, A. D. 1890, in the county of Silver Bow, State of Montana, and that at the time of his death he was a resident of the city of Butte, county of Silver Bow and State of Montana.

That the said annexed will was duly executed by said decedent in his lifetime, in the county of Davis, State of Iowa, in the presence of Job Davis, James Davis, and John C. Sconce, the subscribing witnesses thereto; also, that he acknowledged the execution of the same in their presence and declared the

same to be his last will and testament, and the said witnesses attested the same at his request and in his presence and in the presence of each other; that the said decedent, at the time of executing said will, as aforesaid, was over the age of eighteen (18) years, and was of sound and disposing mind and not acting under duress, menace, fraud or undue influence, or in any respect incompetent to devise and bequeath his estate.

In witness whereof, I have signed this certificate, and caused the same to be attested by the clerk of this court, under the seal thereof, this twenty-seventh day of March, A. D. 1895.

[Seal of the District Court] JOHN J. McHATTON,
Judge of said Court.

Attest:

H. A. NIEDENHOFEN,
Clerk,
By C. V. Henderson,
Deputy Clerk.

Filed Mar. 27, 1895. H. A. Niedenhofen, Clerk. By C. V. Henderson, Deputy.

Complainant's Exhibit, "Order Probating Will."

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of
ANDREW J. DAVIS, Deceased.

Upon the contest of Henry A. Root and Maria Cummings against the probate of the proposed will of the

said deceased, wherein John E. Davis is proponent, and the said Henry A. Root, et al., contestants. And the contest of Harriet Sheffield and Henry A. Davis against the probate of said will, and wherein John E. Davis, administrator of said John A. Davis, deceased, has been substituted for said deceased.

The petition of John A. Davis, deceased, heretofore filed, praying for the admission to probate of a certain document, filed in this court, purporting to be the last will and testament of Andrew J. Davis, deceased, and that letters testamentary be issued to said petitioner, this day regularly coming on to be heard, and it appearing to the Court that John E. Davis has been duly appointed administrator of the estate of said petitioner, John A. Davis, deceased, and that letters of administration have been duly issued to him, and that he is duly qualified and acting as such, and that the said John E. Davis, administrator as aforesaid, has been duly substituted for and in place of the said John A. Davis, deceased, and said petitioner having, by leave of Court, been amended accordingly, and it appearing that the contests of the said Henry A. Root and Maria Cummings, and of Harriet R. Sheffield, and Henry A. Davis, have been compromised and settled, and the said contests this day dismissed and withdrawn in open Court, in pursuance of stipulations and agreements, and it appearing that there is no further contest or opposition to the probate of the said alleged will, and due proof having been made to the satisfaction of this Court that due notice had been given of the time appointed for proving said will, and for hearing said petition, and that citations have

been duly issued and served as required by the previous order of this Court; and it further appearing to this Court that notice has been given according to law, to all parties interested, and after examining John C. Sconce and Mary A. Downey, produced on behalf of said petitioner, whose testimony has been reduced to writing and filed herein, from which it appears that said document is the last will and testament of said Andrew J. Davis, deceased; that it was executed in all particulars as required by law, and that said testator at the time of the execution of the same was of sound and disposing mind, and not under restraint and not acting under duress, menace, fraud or undue influence; that said Andrew J. Davis, deceased, died on the 11th day of March, A. D. 1890, being a resident of the city of Butte, county of Silver Bow, State of Montana, at the time of his death, and leaving both real and personal estate in said county and State and elsewhere.

That the said estate and effects, for and in respect of which the probate of said will is applied for, as aforesaid, does not exceed the value of three million dollars.

And all the parties hereto appearing in open court by their respective attorneys, and in pursuance of the stipulations and agreements and consent in open Court, and upon the proofs aforesaid, it is ordered that the said document heretofore filed, purporting to be the last will and testament of the said Andrew J. Davis, be admitted to probate, as the said last will and testament of the said deceased.

And it appearing by the said agreements and stipulations of the parties, and by consent duly entered in open

court, that Harriet R. Sheffield, now of Northport, Suffolk county, State of New York, and Henry A. Davis, of the town of Monson, State of Massachusetts, are the sole heirs at law of Asa Davis, a brother of Andrew J. Davis, deceased, and are entitled to have and receive each one-fiftieth (1-50) in kind of said estate upon the distribution or distributions of said estate.

And it further appearing by said agreements and stipulations of the parties and by consent duly had in open court that Andrew J. Davis and John E. Davis, of the city of Butte and State of Montana, and Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis, and Morris Allard Davis, all of the city of Chicago and State of Illinois, are the sole heirs at law of John A. Davis, a brother of Andrew J. Davis, deceased, and are entitled to have and receive, upon final distribution of said estate, nineteen forty-fourths (19-44) of the remainder of said estate after deducting one twenty-fifth (1-25) thereof hereinbefore provided for Harriet R. Sheffield and Henry A. Davis, subject, however, to the bequests of said will, no part of which bequests are to be borne by said one twenty-fifth (1-25) of said estate belonging to said Sheffield and Davis.

And it further appearing by said agreements and stipulations of the parties, and by consent duly had in open Court, that Henry A. Root, of the city of Helena, State of Montana, and Ellen S. Cornue, of the town of Croton Falls and State of New York, are the children and sole heirs of Anna C. Root, deceased, a sister of said Andrew J. Davis, and that Sarah Maria Cummings, widow, of the town of Ware and State of Massachusetts, is a sister of

said Andrew J Davis, deceased, and Mary Louisa Dunbar, an unmarried woman, of the city of Springfield and State of Massachusetts, is a niece of the said Andrew J. Davis, deceased, and Elizabeth S. Ladd, of the city of Springfield and State of Massachusetts, is a child and heir of Sophronia Firmin, deceased, who is also a sister of said Andrew J. Davis, deceased, and Charles H. Ladd, her husband, and Joshua G. Cornue, husband of the said Ellen S. Cornue, and are entitled to have and receive twenty-five forty-fourths (25-44) of the remainder of said estate, after the one twenty-fifth (1-25) thereof above provided for said Harriet R. Sheffield and Henry A. Davis, subject to said bequests made in said will:

Now, therefore, it is ordered, adjudged, and decreed in pursuance thereof, that the said Harriet R. Sheffield, of the town of Northport, county of Suffolk and State of New York, and Henry A. Davis of the town of Monson, State of Massachusetts, sole heirs at law of Asa Davis, deceased, brother of Andrew J. Davis, deceased, have and receive each one-fiftieth (1-50) of said estate in kind, on the distribution or distributions thereof; and that the said Andrew J. Davis and John E. Davis, of the city of Butte, State of Montana, Thea Jane Davis, Edward Asa Davis, George Wesley Davis, Charles Granville Davis, and Morris Allard Davis, all of the city of Chicago, State of Illinois, have and receive nineteen forty-fourths (19-44) of the remainder of said estate, after providing for the one twenty-fifth (1-25) of said estate for Harriet R. Sheffield and Henry A. Davis as above, and subject to the bequests made in said will, and that said Henry A. Root, of the city of Helena, State of Montana, Sarah Maria

Cummings, of the town of Ware, State of Massachusetts, Mary Louise Dunbar, of the city of Springfield, State of Massachusetts, Elizabeth S. Ladd, of the city of Springfield, State of Massachusetts, Charles H. Ladd, husband of the said Elizabeth S. Ladd, of the city of Springfield, State of Massachusetts, Ellen S. Cornue, and Joshua G. Cornue, her husband, of the town of Croton Falls, State of New York, have and receive twenty-five forty-fourths (25-44) of the remainder of said estate in kind, after providing for the one-twenty-fifth (1-25) thereof for the said Harriet R. Sheffield and Henry A. Davis, as above, subject to the bequests of said will.

And the said stipulations and agreements of the parties in interest and to be affected by this cause and proceeding is, by consent in open court, adopted and made the basis of this order and decree, according to the terms and provisions of said stipulations and agreements.

Done in open court this 27th day of March, 1895.

JOHN J. McHATTON.

[Endorsed]: (No. 285.) In the Matter of the Estate of Andrew J. Davis, Deceased. Order probating will. Filed Department 1. Mar. 27, 1895, at 10.25 A. M. H. A. Niedenhofen, Clerk. By C. V. Henderson, Deputy, Misc. E,—143.

Complainant's Exhibit, "Petition for Order Confirming Compromise."

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of JOHN A. DAVIS, Deceased.

Your petitioner, John E. Davis, as administrator, respectfully shows:

First.—That John A. Davis died intestate on or about the 24th day of January, 1893, leaving him surviving as heirs at law and next of kin, Thea Jane Davis, his wife; Edward A. Davis, a son; George W. Davis, a son; Charles G. Davis, a son; Morris Allard Davis, a son; Andrew J. Davis, Jr., a son; and John E. Davis, a son.

Second.—That your petitioner is the duly appointed, qualified and acting administrator of the estate of John A. Davis, deceased.

Third.—That Andrew J. Davis, a brother of said John A. Davis, deceased, died in Butte, Montana, on or about the 11th day of March, 1890, leaving him surviving as heirs and next of kin, Diana Davis, a sister; Elizabeth Bowdoin, a sister; Harriet Wood, a sister; Maria Cummings, a sister; Erwin Davis, a brother; Calvin Davis, a brother; John A. Davis, a brother, now deceased; Henry A. Root and Ellen A. Cornue, children of Anna C. Root, deceased, a sister; Henry A. Davis and Harriet Sheffield, children of Asa Davis, deceased, a brother; Elizabeth A.

Smith, and Louise Dunbar, children of Roxanna Dunbar, a sister; and Elizabeth S. Ladd, child of Sophronia Firman, a sister.

Fourth.—That said Andrew J. Davis, deceased, left a large property, real and personal, situated in the State of Montana and elsewhere.

Fifth.—That some time after the death of said Andrew J. Davis a certain will was discovered, dated July 20th, 1866, wherein and whereby, after providing for the life maintenance of certain persons named therein, he bequeathed and devised the entire remainder and residue of said estate to said John A. Davis, now deceased.

Sixth.—That subsequently thereto, and on or about the —— day of July, 1890, said John A. Davis, now deceased, offered said will for probate in this court, and within the time allowed by law, Maria Cummings, Henry A. Root, and Henry A. Davis and Harriet Sheffield filed certain contests to the probate of said will, alleging, among other things, that said will was a forgery, and not the last will and testament of the said Andrew J. Davis, deceased.

Seventh.—That issue was joined on said contests, and in the summer of 1891, the contests of said Maria Cummings and Henry A. Root came on for trial; that the preparations of said contests for trial, and the trial thereof necessitated the expenditure of many thousands of dollars by the parties thereto. That the trial was very protracted, and ended in a disagreement of the jury, said jury standing seven against the validity of said will.

Eighth.—That the disagreement of said jury left the matters of said estate entirely unsettled, and required a retrial of the issues in said contests. That such retrial

would have involved the estate of John A. Davis, now deceased, in other and further large expenditures, with doubtful results. That the estate of Andrew J. Davis, deceased, was constantly depreciating in value, and your petitioner and the other heirs at law and next of kin of said John A. Davis, deceased, believed it to be for the best interest of said estate of John A. Davis, deceased, to endeavor to compromise said contests, and save as much as possible to the estate of John A. Davis, deceased.

Ninth.—That in case said will should finally be defeated, on any of said contests, the interest of said John A. Davis, deceased, in said estate of said Andrew J. Davis, deceased, could not, under the law, have been but one-eleventh thereof, and that the expenses and liabilities necessarily incurred by the said John A. Davis upon the retrial of the contests of Maria Cummings and Henry A. Root above mentioned would have entirely used up any part of said estate of Andrew J. Davis, deceased, which might have been distributed to the estate of said John A . Davis, deceased, if said estate of Andrew J. Davis, deceased, had been distributed as an intestate estate.

Tenth.—And your petitioner further says that both himself and the other heirs at law and next of kin of the said Andrew J. Davis, deceased, believed that the final result of the litigation upon said contests was doubtful, and even if the proponents of said will were successful in such litigation, it would so deplete the estate of said John A. Davis, deceased, that nothing would remain.

Eleventh.—That acting under such belief, and the further belief that it was for the best interest of the estate of said John A. Davis, deceased, to make some compro

mise or settlement of the said contests, your petitioner, jointly with the other heirs at law and next of kin of the said John A. Davis, deceased, did enter into a certain compromise contract with the said Henry A. Root, Maria Cummings, Elizabeth Ladd, Ellen S. Cornue, and Louisa Dunbar, the said Elizabeth Ladd, Ellen S. Cornue and Louisa Dunbar being interested in said contest of Henry A. Root and Maria Cummings, and said contests having been filed in their interests as well as in the interests of said Henry A. Root and Maria Cummings. That said contract of compromise and settlement bears date the 28th day of April, 1893, and your petitioner is ready to produce the same and present it to this Court for examination.

Twelfth.—That among other things provided in said contract of compromise and settlement, it was agreed that the said Henry A. Root and Maria Cummings should on the request and demand of your petitioner and the other heirs at law and next of kin of said John A. Davis, deceased, withdraw their said contests and allow the said will to be probated.

Thirteenth.—That actuated by the same motives and because of the same reasons, your petitioner and the other heirs at law and next of kin of the said estate of John A. Davis, deceased, jointly with the said Henry A. Root and Maria Cummings, Elizabeth Ladd, Louisa Dunbar, and Ellen S. Cornue entered into another and further compromise and settlement with the contestants Henry A. Davis and Harriet Sheffield, bearing date the 25th day of March, 1895, which said compromise and settlement is ready to be produced and submitted to this Court for

its inspection. That it is also provided in and by the terms and conditions of the compromise and settlement last above named that the said contestants Henry A. Davis and Harriet Sheffield, should, upon demand by the other parties to said contract, withdraw their contests and permit the said will to be probated.

Fourteenth.—That thereafter, and on the 27th day of March, 1895, all of said contests then pending were withdrawn and dismissed, and the said will of Andrew J. Davis, deceased, was by order of this Court duly admitted to probate; that said contests were dismissed in consideration of the said compromise and settlement, and because of the agreements of your petitioner and the other heirs at law and next of kin of the said John A. Davis, deceased, agreeing to deliver to the said contestants a certain portion of the estate of the said Andrew J. Davis, deceased.

Fifteenth.—That subsequent to the entry of the order and decree probating the said will of the said Andrew J. Davis, deceased, and within one year thereafter, and within the time allowed by law therefor, certain other contests and petitions for the revocation of the probate of said will were filed by Diana Davis, Harriet Wood, Elizabeth Bowdoin, Calvin P. Davis and Elizabeth Smith. That subsequent to the filing of said contests, the contests of Diana Davis and Harriet Wood were duly dismissed by said Court, leaving pending the contests of Elizabeth Bowdoin, Calvin P. Davis and Elizabeth Smith.

Sixteenth.—That said estate of the said Andrew J. Davis, deceased, had, since the death of the said Andrew J. Davis and the presentation of the said will for pro-

bate, depreciated to such an extent that the said estate was not worth more than 33 per cent of what it was estimated to have been worth at the time of the presentation of the said will for probate. That your petitioner, as such administrator, had been unable to procure any funds with which to liquidate any of the outstanding indebtedness of said estate of John A. Davis, or with which to further defend said will against the said contests. That the results of such contests were of doubtful determination, and your petitioner and the other heirs at law and next of kin of the said estate of John A. Davis, deceased, believing it to be for the best interests of said estate, made another and further compromise and settlement of the said contests of the said Calvin P. Davis and Elizabeth Bowdoin, and the rights of said Harriet Wood, who was interested in said contests, which bears date the 22d day of June, 1897, and of the contest of the said Elizabeth A. Smith, which bears date the 6th day of August, 1897, which said settlement and compromise are ready to be produced by your petitioner and presented to the Court for its examination.

Seventeenth.—That the time has now elapsed for any other person to file any contest against the probate of said will, or any petition for the purpose of revoking the same.

Eighteenth.—That in all of said compromises and settlements it has been provided that each and every amount which has been agreed to be paid or delivered to the said parties so contesting was agreed to be paid and delivered out of the estate of the said Andrew J. Davis, deceased.

Nineteenth.—That all the rights and interests of the

said Diana Davis have been acquired and are now owned by the parties to some of the foregoing contracts of compromise and settlement.

Twentieth.—That your petitioner, as such administrator, has been unable, by reason of said contests of said will, both before and after probate, to secure from the estate of Andrew J. Davis, deceased, for the estate and heirs of said John A. Davis, deceased, any further or greater interest in the property and assets of said estate of Andrew J. Davis, deceased, than is granted and confirmed in and by said contracts of compromise and settlement hereinbefore referred to; and your petitioner and said heirs, in consideration of the withdrawal and dismissal of said contests, have, in and by said contracts, compromises and settlements, relinquished and waived all interest in the estate of Andrew J. Davis, deceased, except such interest therein as is to them expressly reserved and excepted to by said contract.

Wherefore, your petitioner prays that a day may be fixed by this Court for the hearing of this petition, and notice of such hearing to be given as required by law and the order of this Court, and that on such hearing this Court do make an order fully ratifying and confirming each and all of such compromises and settlements so made by your petitioner and the other heirs at law and next of kin, of the estate of said John A. Davis, deceased, and that by order of this Court your petitioner may be directed and empowered and authorized to carry each and all of the said compromises into effect, and to collect and receive such sums of money and property as is provided in said contracts of compromise and settlement to

be paid and delivered to your petitioner and the heirs of John A. Davis, deceased, and accept the same as such administrator in full settlement of the claim of the estate and heirs of said John A. Davis, deceased, against the estate of Andrew J. Davis, deceased, under said will, and that such part of said estate of the said Andrew J. Davis, decased, as may, under said contracts of compromise and settlement be found to belong to the estate of said John A. Davis, deceased, may be distributed to your petitioners as administrator of the said estate.

And thus your petitioner will ever pray, etc.

Dated Butte, Montana, this 19th day of August, A. D. 1897.

JOHN E. DAVIS,
Petitioner.
JAMES W. FORBIS,
Of Counsel for Petitioner.

The State of Montana, } ss.
County of Silver Bow. }

John E. Davis makes oath and says that he is the petitioner in the foregoing petition; that he has read the same, and knows the contents thereof, and that the same is true, except as to those matters stated therein on information and belief, and that as to those he believes it to be true.

JOHN E. DAVIS.

Subscribed and sworn to before me this 19th day of August, A. D. 1897.

[Seal] L. ORIS EVANS,
Notary Public in and for Silver Bow County, Montana.

Filed August 23d, 1897. Clinton C. Clark, Clerk. By R. E. Leonard, Deputy Clerk.

Complainant's Exhibit, "Order on Compromise."

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of JOHN A. DAVIS, Deceased.

ORDER.

The petition of John E. Davis, as administrator of the estate of John A. Davis, deceased, coming on to be heard this day, and all parties in interest appearing in open court and consenting thereto, and waiving notice thereof;

After hearing the allegations and proofs of the petitioner in open court, and after having carefully examined and inspected the contracts of compromise and settlement mentioned in the said petition, and it appearing to the Court therefrom that it was and is for the best interests of the estate of said John A. Davis, deceased, that such contracts of compromise and settlement be ratified and confirmed by this Court, and that said petitioner be directed, authorized and empowered to carry such contracts of compromise and settlement into effect.

And it appearing to the Court that all contracts of compromise and settlement should be satisfied and discharged from the property of the estate of Andrew J. Davis, deceased, and that such petitioner is entitled, as administrator of the estate of John A. Davis, deceased,

to such part of the estate of Andrew J. Davis as may remain in said estate after the payment of the debts of and claims against said estate of Andrew J. Davis, deceased, and the costs, charges and expenses of adminstration of said estate; the satisfaction of the specific legacies provided in the last will of Andrew J. Davis, deceased, and after fully satisfying any and all such contracts of compromise and settlement:

Now, therefore, in consideration of the premises, it is hereby ordered, adjudged and decreed as follows:

First.—That the action of John E. Davis, as administrator of the estate of John A. Davis, deceased, in the making, execution and delivery of those four certain contracts of compromise and settlement described and set forth in the said petition, to wit, one bearing date April 28, 1893, with Henry A. Root, Maria Cummings, Elizabeth S. Ladd, Ellen S. Cornue, and Elizabeth Dunbar—one bearing date March 25, 1895, with Henry A. Davis and Harriet Sheffield; one bearing date June 22, 1897, with Calvin P. Davis, Elizabeth Bowdoin and Harriet Wood; and one bearing date August 6th, 1897, with Elizabeth A. Smith —be, and they severally are hereby, fully ratified, approved and confirmed.

Second.—That the said John E. Davis, administrator of the estate of the said John A. Davis, deceased, be, and he is hereby, given full power and authority as such administrator to carry each and all of said contracts of compromise and settlement into effect.

Third.—That the said John E. Davis, administrator of the estate of the said John A. Davis, deceased, be, and he is hereby, authorized, directed and empowered to receive

from John H. Leyson, administrator with the will annexed of the estate of Andrew J. Davis, deceased, and receipt to said Leyson, adminstrator as aforesaid, in full for all of the interests of the estate of John A. Davis, deceased, in and to the property and estate of Andrew J. Davis, deceased, upon delivery or distribution to him as such administrator, of the residue and remainder of the estate of Andrew J. Davis, deceased, after payment of all debts, claims, and demands against the said estate of Andrew J. Davis, deceased, and all costs, expenses and charges of administration of said estate; and after satisfaction of all legacies mentioned and provided for in said will, and after full satisfaction of each and all of the said contracts of compromise and settlement.

Done in open court this 24th day of August, A. D. 1897.

JOHN LINDSAY,
Judge.

Filed August 24th, 1897. Clinton C. Clark, Clerk. By R. E. Leonard, Deputy Clerk.

Complainant's Exhibit, "Petition to Dismiss all Contests."

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of ANDREW J. DAVIS, Deceased.

Upon the contest of Henry A. Root, Sarah Maria Cummings, against the probate of the will of the said deceased, wherein John A. Davis is proponent, and Henry A. Root et al., contestants; and the contest of Harriet

Sheffield and Henry A. Davis against the probate of said will, wherein John E. Davis, administrator of the estate of John A. Davis, deceased, has been substituted for said deceased; and also upon the petitions of Elizabeth S. Bowdoin, Calvin P. Davis and Elizabeth A. Smith to revoke the probate of said will.

To the Honorable Judge Lindsay, Judge of the Second Judicial District Court of Montana, in and for Silver Bow County:

Your petitioners, Elizabeth S. Bowdoin and John A. Bowdoin, her husband, Harriet Wood, Sarah M. Cummings, Diana Davis, Calvin P. Davis, John E. Davis, administrator of John A. Davis, Elizabeth S. Ladd and Charles H. Ladd, her husband, Harriet R. Sheffield, Henry A. Davis, Henry A. Root and Rosina B. Root, his wife, Ellen S. Cornue and Joshua G. Cornue, her husband, Mary Louise Dunbar, Elizabeth A. Smith, and J. Howard Smith, her husband, John H. Leyson, administrator of the estate of Andrew J. Davis, deceased, and Thea Jane Davis, Edward A. Davis and Mary A. Davis, his wife, George W. Davis, Charles G. Davis and Gertrude F. Davis, his wife, Morris A. Davis, Andrew J. Davis, Jr., and Helen M. Davis, his wife, John E. Davis and Tenie B. Davis, his wife, each separately and severally and jointly show unto your Honor:

That the said Andrew J. Davis, deceased, died at the county of Silver Bow, in the State of Montana, on the 11th day of March, 1890, being at that time a resident of Butte, in said county and State, and possessed and seised of a large estate, real, personal, and mixed, situate in

said said county and elsewhere in the United States of America.

That at the time of the death of the said Andrew J. Davis he left surviving him the following heirs and next of kin: Elizabeth S. Bowdoin, a sister, residing at Springfield, in the State of Massachusetts; Harriet Wood, residing at Springfield, in said last-named State; Sarah Maria Cummings, a sister, residing at Ware in said State; Diana Davis, sister, residing at the town of Somers, in the State of Connecticut; Erwin Davis, a brother, residing at New York City, in the State of New York; Calvin P. Davis, a brother, residing at Sebastopol, in the State of California; John A. Davis, a brother, now deceased, formerly residing at Butte, in the State of Montana; Elizabeth S. Ladd, a niece, residing at Springfield, in the State of Massachusetts, a daughter of Sophronia Firman, a sister of said deceased; Harriet R. Sheffield, a niece, residing at Northport, in the State of New York, and Henry A. Davis, a nephew, residing at Munson, in the State of Massachusetts, being children of Asa Davis, a brother of said deceased; Henry A. Root, a nephew, residing at Butte, in the State of Montana, and Ellen S. Cornue, a niece, residing at Croton Falls, in the State of New York, being children of Anna C. Root, a sister of the said Andrew J. Davis, deceased; Mary L. Dunbar, a niece, residing at Springfield, in the State of Massachusetts, and Elizabeth A. Smith, a niece, residing in Alameda county, in the State of California, being children of Roxanna Davis, deceased, a sister of the said Andrew J. Davis, deceased, and that the above-named persons comprised all

of the heirs at law and next of kin of the said deceased, Andrew J. Davis.

II.

That on the 20th day of July, A. D. 1890, the said John A. Davis, being a brother of the said Andrew J. Davis, deceased, and in all respects duly entitled and qualified in that behalf, filed in this court a certain instrument, in writing, purporting to be the last will and testament of the said Andrew J. Davis, deceased, and in connection therewith his petition in due form of law, for probate of said alleged will and testament, and for his appointment as administrator of the estate of said Andrew J. Davis, deceased, with the said alleged last will and testament annexed.

That the said John A. Davis, with the exception of a few small bequests, was the sole legatee, devisee and beneficiary under said alleged last will and testament.

III.

That after due and proper notice in accordance with the statutes in such cases made and provided for the probate of said alleged last will and testament, and within the time prescribed therefor, the said Henry A. Root and Sarah Maria Cummings interposed in writing their objections to the probate thereof, in which said contest the said Elizabeth S. Ladd, Mary L. Dumbar and Ellen S. Cornue were interested, and the said Harriet R. Sheffield and Henry A. Davis likewise interposed in writing their objections to the probate thereof.

That thereafter, on the 24th day of January, 1893, the said proponent of said alleged last will and testament,

John A. Davis, died intestate, leaving surviving him as sole heirs at law and next of kin, his wife, Thea Jane Davis, Edward A. Davis, George W. Davis, Charles G. Davis, Morris A. Davis, Andrew J. Davis, Jr., and John E. Davis, all sons of the said John A. Davis, deceased, all of whom are now living.

And on the 11th day of March, 1893, his said son John E. Davis, being in all respects entitled and qualified to administer upon the estate of his said father, was duly appointed administrator thereof by this Court, and letters of administration were thereupon issued to him, the said John E. Davis, who is now and ever since hath been the duly qualified and acting administrator of the estate of said last named deceased, and as such was substituted as proponent of said alleged last will and testament.

That thereafter, by the consent, compromise and agreement of all of the parties to the said contests, said alleged last will and testament was duly admitted to probate, and a decree of this court on the 27th day of March, A. D. 1895, duly rendered and entered probating said will upon the proper necessary proofs and adduced in pursuance of said contests, compromises and agreements, and defining therein the respective rights and interests coming to the said parties in pursuance of the said compromise and agreement.

IV.

That after said alleged last will and testament was so admitted to probate, and said decree so entered as aforesaid, and within the time prescribed by law therefor, some of the heirs at law and next of kin, not including

the contestants hereinbefore named, one Hulda Queen Davis, claiming to be the widow of said Andrew J. Davis, deceased, Mary Isabelle Morròw and Laura Annis Calhoun, claiming to be children of the said Andrew J. Davis, deceased, filed their petition to set aside the decree probating said alleged last will and testament, and to cancel and annul the same.

That the said Hulda Queen Davis, Mary Isabelle Morrow and Laura Annis Calhoun have heretofore abandoned their said claim and dismissed their said petitions, all of which will appear by reference to the records of this court in that behalf.

V.

That on the 8th day of April, A. D. 1895, John H. Leyson was duly appointed administrator of the estate of Andrew J. Davis, deceased, with the said will annexed, and letters of administration duly issued to him as such, which are still in full force and effect; and that the said John H. Leyson hath ever since been and now is the duly appointed and qualified and acting administrator of the said estate of said deceased; that due and proper notice to the creditors of said estate has been regularly given in pursuance of the statute in such case made and provided, and that more than twelve months have elapsed since the appointment of said administrator, and that more than ten months have elapsed since the first publication of said notice to creditors of said estate. And that like notice has been given by the admisintrator of the estate of said John A. Davis, deceased, and that the time has long since expired for approving claims against the same.

VI.

That the said contests of the said Henry A. Root, Sarah Maria Cummings, Elizabeth S. Ladd, Mary L. Dunbar and Ellen S. Cornue, as hereinbefore stated, came on for trial in the summer of 1891, and that said trial and the preparation therefor necessitated the expenditure of many thousands of dollars by the parties interested therein. That said trial was very protracted and ended in a disagreement of the jury, said jury standing seven against the validity of said will, and five in favor of the validity thereof.

That the disagreement of said jury left the matters of said estate entirely unsettled, and required a retrial of the issues of said contest; that said retrial would have involved the estate of said John A. Davis, deceased, and the heirs at law of the said Andrew J. Davis, deceased, in other and further large expenditures with doubtful result.

That the estate of the said Andrew J. Davis, deceased, was and is constantly depreciating in value, and your petitioners, heirs at law and next of kin of the said Andrew J. Davis, deceased, and also the said John A. Davis, deceased, and also the administrator of the estate of said John A. Davis, deceased, and heirs at law and principal beneficiaries under said will, believing it to be for the best interest of said estate, made the compromise agreements and procured the order to be made on the 27th day of March, 1895, A. D., as hereinbefore set forth, and, among other things, provided in said contracts of compromise and settlement, and in said decree, that the

said Henry A. Root, Sarah Maria Cummings, and the said Harriet R. Sheffield and Henry A. Davis should, on the request and demand of the parties to said compromise agreements, withdraw their said contests, and allow the said will to be probated, all of which was done and accomplished accordingly.

VII.

That thereafter, to wit, and within the time allowed by the statutes in such case made and provided, the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood, Elizabeth A. Smith and Diana Davis, for the purpose of contesting the validity of said alleged will in this court, in which the said will was proven filed their petitions in writing, containing the allegations against the validity of said will and praying that the probate thereof be revoked.

VIII.

That actuated by the same purposes and motives and for the same reasons upon which the compromise and settlement of the contests heretofore mentioned were made, the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood, Elizabeth A. Smith and Diana Davis settled and compromised the said controversies, so that the portion of the said estate mentioned and referred to in said compromise agreements, and to be distributed accordingly, was to be retained and held by the administrator of the estate of said Andrew J. Davis, deceased, and administered by and through the administrator of the said estate, and was not to pass to the estate of said John A. Davis, deceased, or to be administered upon by the

administrator of said last named estate. That the said John E. Davis, administrator as aforesaid, was a party to all of said compromises hereinbefore mentioned.

IX.

That in pursuance of a petition duly filed in said court by the administrator of the estate of said John A. Davis, deceased, a certain order was duly made and entered approving the acts of said administrator in making, executing and delivering the said several compromise agreements aforesaid, and that subsequent to the filing of said petitions to set aside the order probating said will, certain contests theretofore instituted by Diana Davis and Harriet Wood were dismissed by said Court, leaving only then pending the contests of the said Elizabeth S. Bowdoin, Calvin P. Davis and Elizabeth A. Smith, which said last-named contests by said last mentioned compromise agreement and the order of the Court directing the same are to be dismissed in accordance therewith.

X.

That the said Erwin Davis filed no contest against the probating of said alleged will, nor did he at any time within the time prescribed by the statutes in such case made and provided, contest said alleged will or the validity thereof, or file any petition for that purpose after the order and decree was entered admitting said will to probate, on account whereof and of the said compromises hereinbefore set forth, there will be no contests or petitions contesting the validity of said will in this court, after the dismissal of the contests of Elizabeth S. Bowdoin, Calvin P. Davis, and Elizabeth A. Smith by the order to be made hereon.

And that by reason of the foregoing facts all of the parties interested in the estate of said Andrew J. Davis, deceased, as heirs at law and next of kin, and all of the parties interested under the said will, have settled and compromised their conflicting interests.

XI.

That in pursuance of said last-named compromise agreements, the separate and individual rights of the parties so interested in said estate as aforesaid have been specifically defined and designated, on account of which it becomes and is necessary that the order of March 27th, 1895, so heretofore made, may be superseded and supplemented by an order of this Court, in the matter of the estate of said Andrew J. Davis, deceased, as hereinbefore set forth, so as to conform to the compromise agreements.

XII.

That in pursuance of all of the compromise agreements hereinbefore mentioned and set forth, the shares and interests of the various parties thereto have been fixed and defined as follows, to wit, subject to the bequests in said will given to Thomas Jefferson Davis, Pet Davis and Miss Bergett, and the expenses of administration and outstanding debts of said estate of said Andrew J. Davis, deceased; the said John E. Davis, as administrator of the estate of John A. Davis, deceased, is entitled to have and receive two hundred eleven-hundredths (200-1100) of said estate in kind; the said Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue

are entitled to have and receive two hundred and fifty eleven-hundredths (250-1100) of said estate in kind; the said Harriet R. Sheffield and Henry A. Davis are entitled to have and receive forty-four eleven-hundredths (44-1100) of said estate in kind; the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood are each entitled severally to have and receive fifty eleven-hundredths (50-1100) of said estate in kind; and the said Elizabeth A. Smith is entitled to have and receive twenty-five eleven-hundredths (25-1100) of said estate in kind; but by the terms of said compromise agreements it is provided that no portion of the real estate owned by the said Andrew J. Davis and situated in the State of Iowa shall comprise any portion of said estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith are entitled to in pursuance thereof; nor are they to be chargeable with any part of the bequest given to the said Thomas Jefferson Davis in said will, but the same shall be settled as to them as if no bequest had been made. And finally, Andrew J. Davis, Jr., and Charles H. Palmer, trustees appointed in and by the compromise agreement dated April 23, 1893, are entitled to have and receive as such trustees, and for the purpose of such trust, four hundred and thirty-one eleven-hundredths (431-1100) of said estate in kind.

Wherefore, your petitioners pray that all of said contests now pending be dismissed, and that it be ordered, adjudged, and decreed that the said order and decree heretofore made upon the 27th day of March, 1895, be so changed and modified as to set forth the rights of the

petitioners and persons interested in said estate, and so as to require the administrator of said estate of the said Andrew J. Davis, deceased, to retain and hold in his hands and possession and control all of that portion of said estate to be held and distributed by him in pursuance of the compromise agreements aforesaid, and the order to be made hereon.

And your petitioner will ever pray, etc.

HENRY A. ROOT.

TOOLE & WALLACE,
J. B. CLAYBERG,
Attorneys for Henry A. Root et al.

W. W. DIXON and
FORBIS & FORBIS, and
Attorneys for Heirs of John A. Davis, Deceased.

J. B. LEYSON,
Administrator Estate of A. J. Davis, Deceased.

C. P. DRENNEN and
CHAS. M. DEMOND,
Attorneys for Calvin P. Davis, Harriet Wood and Elizabeth S. Bowdoin.

J. HOWARD SMITH,
Attorney for Elizabeth A. Smith, Contestant.

The State of Montana,
County of Silver Bow. } ss.

Henry A. Root makes oath and says: That he is one of the petitioners in the foregoing petition; that he has read the same, and knows the contents thereof, and that the same is true except as to those matters stated therein upon information and belief, and that as to those he believes it to be true.

HENRY A. ROOT.

Subscribed and sworn to before me this 24th day of August, A. D. 1897.

[Court Seal] R. E. LEONARD,

Deputy Clerk of the District Court.

Filed August 24th, 1897. Clinton C. Clark, Clerk. By R. E. Leonard, Deputy Clerk.

Complainant's Exhibit, "Decree of Distribution on Compromise."

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of
ANDREW J. DAVIS, Deceased.

Upon the contest of Henry A. Root, Sarah Maria Cummings, against the probate of the will of the said deceased, wherein John A. Davis is proponent, and Henry A. Root et al. contestants; and the contest of Harriet Sheffield and Henry A. Davis against the probate of said will, wherein John E. Davis, administrator of the estate of John A. Davis, deceased, has been substituted for said deceased; and also upon the petition of Elizabeth S. Bowdoin, Calvin P. Davis, and Elizabeth A. Smith to revoke the probate of said will.

Be it remembered that on the 24 day of August, 1897, the petition in the above-entitled proceeding coming on to be heard, and it appearing therefrom that all the parties interested in the estate of the said Andrew J. Davis, deceased, and the estate of the said John A. Davis, deceased, are parties to the compromise agreements

therein referred to, and that an order of the Court has been heretofore made on the 24 day of August, 1897, confirming the acts of the administrator of the estate of the said John A. Davis, deceased, in making, executing and delivering the compromise agreements therein referred to and all of the said parties so interested in said contests now pending are represented by attorneys present in court. It is ordered that the contests heretofore instituted in this court by Elizabeth S. Bowdoin, Calvin P Davis and Elizabeth A. Smith, be, and the same are hereby, dismissed (and the order admitting said will to probate being no longer opposed, said order is in all respects confirmed), each party to pay his or her own costs.

And it appearing from said petition that the order and decree of this Court heretofore made on the 27th day of March, 1895, should be so modified and changed as to entirely conform to said compromise agreements and the order of this Court confirming the making, executing and delivering the same, it is ordered, adjudged and decreed it be so modified and changed accordingly and in accordance with the provisions hereinafter stated, and that the administrator of the estate of Andrew J. Davis, deceased, with the will annexed, keep, retain, and hold in his possession and under his control as such administrator all funds, property, and effects necessary and proper to carry out said compromise agreements, said order and the provisions thereof.

And it is hereby ordered, adjudged, and decreed in pursuance of said petition, said compromise agreements and order confirming them, that the rights of the respective parties in said estate of said Andrew J. Davis,

deceased, and so held, retained, and controlled by said administrator, and to be distributed by him, be, and the same are hereby established and declared to be as follows, to wit, that is to say: Subject to the bequests in said will of said Andrew J. Davis, deceased, given to Pet Davis, Thomas Jefferson Davis and Miss Bergett, and the expenses of administration and outstanding debts of said estate, the parties to said compromise agreements are hereby adjudged to have and to be entitled to receive the following portions of said estate of said Andrew J. Davis, deceased, to wit:

Two hundred eleven-hundredths (200-1100) thereof in kind to John E. Davis, as administrator of the estate of John A. Davis, deceased; two hundred and fifty eleven-hundredths (250-1100) thereof in kind to Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue; forty-four eleven-hundredths (44-1100) thereof in kind to Harriet R. Sheffield and Henry A. Davis; fifty eleven-hundredths (50-1100) thereof in kind to Calvin P. Davis; fifty eleven-hundredths (50-1100) thereof in kind to Harriet Wood; twenty-five eleven-hundredths (25-1100) thereof in kind to Elizabeth A. Smith; fifty eleven-hundredths (50-1100) thereof in kind to Elizabeth S. Bowdoin. And finally, Andrew J. Davis, Jr., and Charles H. Palmer, trustees appointed in and by the compromise agreement dated April 23, 1893, are entitled to have and receive as such trustees and for the purpose of such trust four hundred and thirty-one eleven-hundredths (431-1100) of said estate in kind.

It being further ordered, however, that no portion of

the real estate owned by said Andrew J. Davis, and situated in the State of Iowa, shall comprise any portion of said estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith shall be entitled to receive under the provisions hereof, nor shall they be chargeable with any part of the bequest given to said Thomas Jefferson Davis in said will, but the same shall be settled as to them as if no bequest had been made. And the said contracts and agreements of compromise of the said parties in interest and to be effected by this cause and proceeding are, by consent in open court, adopted and made the basis of this order and decree, according to the terms and provisions of said contracts and agreements.

Done in open court this 24th day of August, A. D. 1897.

JOHN LINDSAY,

Judge.

Filed August 24th, 1897.

Complainant's Exhibit, "Petition for Partial Distribution of Diana Davis et al."

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of
ANDREW J. DAVIS, Deceased. }

To the Honorable Judge of the District Court aforesaid:

Your petitioners, Diana Davis, Sarah M. Cummings, Harriet Wood, Elizabeth S. Bowdoin and John A. Bow-

doin, her husband, Calvin P. Davis, Ellen S. Cornue and Joshua G. Cornue, her husband, Henry A. Root and Rosina B. Root, his wife, Mary L. Dunbar, Elizabeth A. Smith and J. Howard Smith, her husband, Harriet R. Sheffield, Henry A. Davis, Elizabeth S. Ladd, and Charles H. Ladd, her husband, Andrew J. Davis, Jr., and Helen M. Davis, his wife, John E. Davis and Tenie B. Davis, his wife, Edward A. Davis and Mary A. Davis, his wife, Charles G. Davis and Gertrude F. Davis, his wife, George W. Davis, Morris A. Davis and Thea Jane Davis, being all of the heirs and next of kin of Andrew J. Davis, deceased, who are interested in his estate, each for himself or herself, and jointly and severally, and Andrew J. Davis, Jr., and Charles H. Palmer, trustees under the compromise agreement dated April 28, 1893, heretofore approved by this Court, jointly and severally petition this Court and show unto your Honor;

I.

That the said Andrew J. Davis died on the 11th day of March, 1890, being at that time a resident of the city of Butte, in said county and State, seised and possessed of a large estate, real, personal and mixed, situated in said county and elsewhere.

That at the time of the death of the said Andrew J. Davis he left surviving him the following heirs at law and next of kin: Elizabeth S. Bowdoin, a sister, residing at Springfield, in the State of Massachusetts; Harriet Wood, residing at Springfield, in said last-named State; Sarah Maria Cummings, a sister, residing at Ware, in said State; Diana Davis, a sister, residing at the town of Somers, in the State of Connecticut; Erwin Davis, a

brother, residing at New York City, in the State of New York; Calvin P. Davis, a brother, residing at Sebastopol, in the State of California; John A. Davis, a brother, now deceased, formerly residing at Butte, in the State of Montana; Elizabeth S. Ladd, a niece, residing at Springfield, in the State of Massachusetts, a daughter of Sophronia Firman, a sister of said deceased; Harriet R. Sheffield, a niece, residing at Northport in the State of New York, and Henry A. Davis, a nephew, residing at Munson, in the State of Massachusetts, being children of Asa Davis, a brother of said deceased; Henry A. Root, a nephew, residing at Butte, in the State of Montana, and Ellen S. Cornue, a niece, residing at Croton Falls, in the State of New York, being children of Annie C. Root, a sister of the said Andrew J. Davis, deceased; Mary L. Dunbar, a niece residing at Springfield, in the State of Massachusetts, and Elizabeth A. Smith, a niece, residing at Claremont, in the State of California, being children of Roxanna Davis, deceased, a sister of the said Andrew J. Davis, deceased, and that the above named persons comprised all of the heirs at law and next of kin of the said deceased, Andrew J. Davis.

II.

That on the 20th day of July, A. D. 1890, the said John A. Davis, being a brother of the said Andrew J. Davis, deceased, and in all respects duly entitled and qualified in that behalf, filed in this court a certain instrument in writing, purporting to be the last will and testament of the said Andrew J. Davis, deceased, and in connection therewith his petition in due form of law, for probate of said alleged will and testament, and for his appointment

as administrator of the estate of said Andrew J. Davis, deceased, with the said alleged last will and testament annexed.

That the said John A. Davis, with the exception of a few small bequests, was the sole legatee, devisee, and beneficiary under said alleged last will and testament.

III.

That after due and proper notice in accordance with the statutes in such case made and provided for the probate of said alleged last will and testament, and within the time prescribed therefor, the said Henry A. Root and Sarah Maria Cummings interposed in writing their objections to the probate thereof, in which said contest the said Elizabeth S. Ladd, Mary L. Dunbar, and Ellen S. Cornue were interested, and the said Harriet R. Sheffield and Henry A. Davis likewise interposed their objections in writing to the probate thereof.

That thereafter, on the 24th day of January, 1893, the said proponent of said alleged last will and testament, John A. Davis, died intestate, leaving surviving him as sole heirs at law and next of kin, his wife, Thea Jane Davis, Edward A. Davis, George W. Davis, Charles G. Davis, Morris A. Davis, Andrew J. Davis, Jr., and John E. Davis all sons of the said John A. Davis deceased, all of whom are now living.

And on the 11th day of March, 1893, his said son, John E. Davis, being entitled and qualified in all respects to administer upon the estate of his said father, was duly appointed administrator thereof, and letters of administration were thereupon issued to him, the said John E. Davis, who is now and ever since hath been the duly

qualified and acting administrator of the estate of said last-named deceased, and as such was substituted as proponent of said alleged last will and testament.

That thereafter, by the consent, compromise and agreement of all of the parties to the said contests, said alleged last will and testament was duly admitted to probate, and a decree of this Court on the 27th day of March, A. D. 1895, duly rendered and entered, probating said will upon the necessary and proper proofs adduced in pursuance of said contests, compromises and agreements, and defining therein the respective rights and interests coming to the said parties in pursuance of the said compromises and agreements.

IV.

That on the 8th day of April, A. D. 1895, John H. Leyson was duly appointed administrator of the estate of Andrew J. Davis, deceased, with the will annexed, and letters of administration duly issued to him as such, which are still in full force and effect; and that the said John H. Leyson hath ever since been, and now is, the duly appointed and qualified and acting administrator of the said estate of said deceased; that due and proper notice to the creditors of the said estate has been regularly given in pursuance of the statute in such case made and provided, and that more than twelve months have elapsed since the appointment of such administrator, and that more than ten months have elapsed since the first publication of said notice to creditors of said estate.

V.

That thereafter, to wit, and within the time allowed by the statutes in such case made and provided, the said

Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood, Elizabeth A. Smith and Diana Davis, being all the other heirs at law and next of kin of said Andrew J. Davis, deceased, except the said Erwin Davis, for the purpose of contesting the validity of said alleged will in this court, in which the said will was proven, filed their positions in writing, containing the allegations against the validity of said will, and praying that the probate thereof be revoked.

VI.

That the said Erwin Davis filed no contest against the probating of said alleged last will and testament, nor did he within the time prescribed by law contest said will or the validity thereof, or file any petition for that purpose after the order and decree was entered admitting said will to probate; that all contests so interposed were dismissed, and the probate of said will duly confirmed and in pursuance of the compromise agreements of all the respective parties and of all your petitioners, that the rights and interests of the parties and of your petitioners in the estate of said Andrew J. Davis, deceased, are as follows, to wit: Subject to the legacies in said will contained, to Thomas Jefferson Davis, Pet Davis, and Miss Berget, and the expenses of administration of said estate of Andrew J. Davis, deceased; the said John E. Davis, as administrator of the estate of John A. Davis, deceased, is entitled to have and receive two hundred eleven-hundredths (200-1100) of said estate in kind; the said Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue are entitled

to have and receive two hundred and fifty eleven-hundredths (250-1100) of said estate in kind; the said Harriet R. Sheffield and Henry A. Davis are entitled to have and receive forty-four eleven-hundredths (44-1100) of said estate in kind; the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood are each entitled severally to have and receive fifty eleven-hundredths (50-1100) of said estate in kind; and the said Elizabeth A. Smith is entitled to have and receive twenty-five eleven-hundredths (25-1100) of said estate in kind; but by the terms of said compromise agreements it is provided that no portion of the real estate owned by the said Andrew J. Davis, deceased, and situated in the State of Iowa, shall comprise any portion of the estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith are entitled to in pursuance thereof; nor are they to be chargeable with any part of the bequest given to the said Thomas Jefferson Davis in said will, but the same shall be settled as to them as if no bequest had been made. And finally, Andrew J. Davis, Jr., and Charles H. Palmer, trustees appointed by the compromise agreement dated April 28th, 1893, are entitled to have and receive four hundred and thirty-one eleven-hundredths (431-1100) of said estate in kind, to be held and disposed of by them pursuant to the provisions of said trust.

VII.

That after said twelve months had elapsed since the appointment of said administrator, and that after more than ten months had elapsed since the publication of

said notice to creditors as hereinbefore stated, no claims have been proven up and allowed against said estate which have not been fully paid, and that no injury or damage whatever can accrue by the partial distribution of said estate requested by your petitioners; that there is now a large amount of money on hand and in the possession and control of said administrator, to wit, the sum of nine hundred seventy-two thousand ninety-four dollars and forty-seven cents ($972,094.47), besides a large amount of other property as shown by the inventory filed herein, among other real estate worth over two hundred thousand ($200,000) dollars, and stock and secured good notes worth over one hundred and ten thousand ($110,-000) dollars; and that aside from the property hereinbefore mentioned there is also in the hands of ancillary special administrators of said estate in the city of Boston and State of Massachusetts property amounting to over four hundred and fifty thousand ($450,000) dollars over and above all claims against said estate in said State of Massachusetts. That the contingent claims against said estate amount to the sum of one hundred eighty-five thousand ($185,000) dollars, and that there are no other claims or demands whatever, except those involving the expenses and costs of administration, which, as your petitioners are informed and verily believe, will not exceed the sum of one hundred ten thousand ($110,-000) dollars. That the bequests in said will mentioned will not in all exceed the sum of four thousand ($4,000) dollars, and that your petitioners hereinbefore named are the only heirs at law and next of kin entitled to participate and share in the division of said estate. That your

petitioners are informed and verily believe that the assets in the hands of said ancillary administrator will in all probability be amply sufficient to satisfy any and all contingent claims against said estate, and leave a large surplus over and above the same and that the sum of six hundred and seventy thousand ($670,000) dollars can safely be now ordered to be distributed to your petitioners.

Wherefore, your petitioners pray that a time and place be fixed for the hearing of said petition; that an order fixing the notice thereof be given in pursuance of the statutes in such case made and provided; and that upon said hearing an order and decree be made for the partial distribution of said estate, and that your petitioners have their respective parts and portions thereof, and that such other and further relief may be had as may be just and proper.

And thus your petitioners will ever pray, etc.

Dated this 23d day of August, A. D. 1897.

W. W. DIXON and
FORBIS & FORBIS,

Attorneys for Heirs of John A. Davis, Deceased and for J. H. Leyson, Administrator of Estate of A. J. Davis, Deceased.

TOOLE & WALLACE,
J. B. CLAYBERG,
Attorneys for Petitioners.
HENRY A. ROOT.

GEORGE F. SHELTON and
CULLEN & TOOLE,

Attorneys for Harriet R. Sheffield and Henry A. Davis.

C. P. DRENNEN and
C. M. DEMOND,

Attorneys for Calvin P. Davis, Harriet Wood and Elizabeth S. Bowdoin.

J. HOWARD SMITH,
Attorney for Elizabeth A. Smith.

The State of Montana, }
County of Silver Bow. } ss.

Henry A. Root makes oath and says that he is one of the petitioners herein for a partial distribution of the estate of Andrew J. Davis, deceased; that he has read the foregoing petition and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge, except as to those matters therein stated on information and belief, and that as to those he believes it to be true.

HENRY A. ROOT.

Subscribed and sworn to before me this 24th day of August, A. D. 1897.

[Court Seal] R. E. LEONARD,

For the County of Silver Bow, the State of Montana.
Deputy Clerk of the District Court.

Filed Aug 24, 1897.

Complainant's Exhibit, "Petition for Partial Distribution of J. E. Davis.

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of
ANDREW J. DAVIS, Deceased.

To the Honorable Judge of the District Court aforesaid:

Your petitioner, John E. Davis, as administrator of the estate of John A. Davis, deceased, respectfully shows unto your Honor that the said Andrew J. Davis died on the 11th day of March, 1890, being at that time a resident of the city of Butte, in said county and State, seised and possessed of a large estate, real, personal, and mixed, situated in said county and elsewhere.

That at the time of the death of said Andrew J. Davis he left surviving him the following heirs at law and next of kin: Elizabeth S. Bowdoin, a sister, residing at Springfield, in the State of Massachusetts; Harriet Wood, residing at Springfield, in said last-named State; Sarah Maria Cummings, a sister residing at Ware, in said State; Diana Davis, a sister, residing at the town of Somers, in the State of Connecticut; Erwin Davis, a brother, residing at New York City, in the State of New York; Calvin P. Davis, a brother, residing at Sebastopol, in the State of California; John A. Davis, a brother, now deceased, formerly residing at Butte, in the State of Montana; Elizabeth S. Ladd, a niece, residing at Springfield, in the State of Mas-

sachusetts, a daughter of Sophronia Firman, a sister of said deceased; Harriet R. Sheffield, a niece residing at Northport, in the State of New York, and Henry A. Davis, a nephew, residing at Munsen, in the State of Massachusetts being children of Asa Davis, a brother of said deceased; Henry A. Root a nephew, residing at Butte, in the State of Montana, and Ellen S. Cornue, a niece, residing at Croton Falls, in the State of New York, being children of Annie C. Root a sister of the said Andrew J. Davis deceased; Mary L. Dunbar, a niece, residing at Springfield, in the State of Massachusetts, and Elizabeth A. Smith,a niece, residing at Claremont, in the State of California, being children of Roxanna Davis, deceased, a sister of the said Andrew J. Davis, deceased, and that the above-named persons comprised all of the heirs at law and next of kin of the said deceased, Andrew J. Davis.

II.

That on the 20th day of July, A. D. 1890, the said John A. Davis, being a brother of the said Andrew J. Davis, deceased, and in all respects duly entitled and qualified in that behalf, filed in this court a certain instrument in writing, purporting to be the last will and testament of the said Andrew J. Davis, deceased, and in connection therewith his petition in due form of law, for probate of said alleged will and testament, and for his appointment as administrator of the estate of said Andrew J. Davis, deceased, with the said alleged last will and testament annexed.

That the said John A. Davis, with the exception of a few small bequests, was the sole legatee, devisee, and beneficiary under said alleged last will and testament.

III.

That after due and proper notice in accordance with the statutes in such case made and provided, for the probate of said alleged last will and testament, and within the time prescribed therefor, the said Henry A. Root and Sarah Maria Cummings interposed in writing their objection to the probate thereof, in which said contest the said Elizabeth S. Ladd, Mary L. Dunbar, and Ellen S. Cornue were interested, and the said Harriet R. Sheffield, and Henry A. Davis likewise interposed their objections in writing to the probate thereof.

That thereafter, on the 24th day of January, 1893, the said proponent of said alleged last will and testament, John A. Davis, died intestate, leaving him surviving him as sole heirs at law and next of kin, his wife, Thea Jane Davis, Edward A. Davis, George W. Davis, Charles G. Davis, Morris A. Davis, Andrew J. Davis, Jr., and John E. Davis, your petitioner, all sons of the said John A. Davis, deceased, all of whom are now living.

And on the 11th day of March, 1893, his said son, John A. Davis, your petitioner, being entitled and qualified in all respects to administer upon the estate of his said father, was duly appointed administrator thereof, and letters of administration were thereupon issued to him, the said John E. Davis, who is now and ever since hath been the duly qualified and acting administrator of the estate of said last-named deceased, and as such was substituted as proponent of said alleged last will and testament.

That thereafter, by the consent, compromise and agreement of all of the parties to the said contests, said alleged

last will and testament was duly admitted to probate, and a decree of this court on the 27th day of March, A. D. 1895, duly rendered and entered probating said will upon the necessary and proper proofs adduced in pursuance of said contests, compromise and agreements, and defining therein the respective rights and interests coming to the said parties in pursuance of the said compromises and agreements.

IV.

That on the 8th day of April, A. D. 1895, John H. Leyson was duly appointed administrator of the estate of Andrew J. Davis, deceased, with the will annexed, and letters of administration duly issued to him as such, which are still in force and effect; and that the said John H. Leyson hath ever since been, and now is, the duly appointed and qualified and acting administrator of the said estate of said deceased; that due and proper notice to the creditors of the said estate has been regularly given in pursuance of the statute in such case made and provided, and that more than twelve months have elapsed since the appointment of such administrator, and that more than ten months have elapsed since the first publication of said notice to creditors of said estate.

V.

That thereafter, to wit, and within the time allowed by the statutes in such case made and provided, the said Elizabeth S. Bowdoin, Calvin P. Davis Harriet Wood, Elizabeth A. Smith and Diana Davis, being all the other heirs at law and next of kin of said Andrew J. Davis, deceased, except the said Erwin Davis, for the purpose of contesting the validity of said alleged will in this court,

in which the said will was proven, filed their petitions in writing, containing the allegations against the validity of said will, and praying that the probate thereof be revoked.

VI.

That the said Erwin Davis filed no contest against the probating of said alleged will and testament, nor did he within the time prescribed by law contest said will or the validity thereof, or file any petition for that purpose after the order and decree was entered admitting said will to probate; that all contests so interposed were dismissed, and the probate of said will duly confirmed and in pursuance of the compromise agreements of all the respective parties; that the rights and interests of the parties in the estate of said Andrew J. Davis, deceased, are as follows, to wit: Subject to the legacies in said will contained to Thomas Jefferson Davis, Pet Davis, and Miss Berget, and the expenses of administration of said estate of Andrew J. Davis, deceased; the said John E. Davis, as administrator of the estate of John A. Davis, deceased, is entitled to have and receive two hundred eleven-hundredths (200-1100) of said estate in kind; the said Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue are entitled to have and receive two hundred and fifty eleven-hundredths (250-1100) of said estate in kind; the said Harriet R. Sheffield and Henry A. Davis are entitled to have and receive forty-four eleven-hundredths (44-110) of said estate in kind; the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood are each entitled severally to have and receive fifty eleven-hundredths

(50-1100) of said estate in kind; and the said Elizabeth A. Smith is entitled to have and receive twenty-five eleven-hundredths (25-1100) of said estate in kind; but by the terms of said compromise agreements it is provided that no portion of the real estate owned by the said Andrew J. Davis, deceased, and situated in the State of Iowa, shall compromise any portion of the estate in estimating and ascertaining the amount to which said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith are entitled to in pursuance thereof; nor are they to be chargeable with any part of the bequest given to the said Thomas Jefferson Davis in said will, but the same shall be settled as to them as if no bequest had been made; and finally, Andrew J. Davis, Jr., and Charles H. Palmer, trustees, appointed by the compromise agreement dated April 28, 1893, are entitled to have and receive four hundred and thirty-one eleven-hundredths (431-1100) of said estate in kind, to be held and disposed of by them pursuant to the provisions of said trust.

VII.

That after said twelve months had elapsed since the appointment of said administrator, and that after more than ten months had elapsed since the publication of said notice to creditors as hereinbefore stated, no claims have been proven up and allowed against said estate which have not been fully paid, and that no injury or damage whatever can acrue by the partial distribution of said estate requested by your said petitioner; that there is now a large amount of money on hand and in possession and control of said administrator, to wit, the sum of nine hundred and seventy-two thousand ninety-four dollars and

forty-seven cents ($972,094.47), besides a large amount of other property as shown by the inventory filed herein, among other real estate worth over two hundred thousand ($200,000) dollars, and the stock and secured good notes worth over one hundred and ten thousand ($110,-000) dollars, and that aside from the property hereinbefore mentioned there is also in the hands of ancillary special administrator of said estate, in the city of Boston and State of Massachusetts, property amounting to the sum of four hundred and fifty thousand ($450,000) dollars, over and above all claims against said estate in said State of Massachusetts. That the contingent claims against said estate amount to the sum of one hundred eighty-five thousand ($185,000) dollars, and that there are no other claims or demands whatsoever, except those involving the expenses and costs of administration, which, as your petitioner is informed and verily believes, will not exceed the sum of one hundred and ten thousand ($110,000) dollars. That the bequests in said will mentioned will not in all exceed the sum of four thousand ($4,000) dollars, and that the said parties hereinbefore named are the only heirs at law and next of kin entitled to participate and share in the division of said estate. That your petitioner is informed and verily believes that the assets in the hands of said ancillary special administrators will, in all probability, be amply sufficient to satisfy any and all contingent claims against said estate, and leave a very large surplus over and above the same, and that the sum of six hundred and seventy thousand ($670,000) dollars can safely be now distributed to the parties entitled.

Wherefore, your petitioner prays that a time and place

be fixed for the hearing of said petition; that an order fixing the notice thereof be given in pursuance of the statute in such case made and provided, and that upon said hearing an order and decree be made for the partial distribution of said estate, and that your petitioner have his part and portion thereof, and that such other and further relief may be had as may be just and proper.

And thus your petitioner will ever pray, etc.

Dated this 23d day of August, A. D. 1897.

JOHN E. DAVIS,
Administrator of the Estate of John A. Davis, Deceased.

JAMES W. FORBIS,
Attorneys for Petitioner.

The State of Montana, }
County of Silver Bow. } ss.

John E. Davis makes oath and says that he is one of the heirs at law and next of kin of the said Andrew J. Davis, deceased, and administrator of the estate of John A. Davis, deceased, and is the petitioner herein for a partial distribution of the said estate of Andrew J. Davis, deceased; that he has read the foregoing petition and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge, except as to those matters therein stated on information and belief, and that as to those he believes it to be true.

JOHN E. DAVIS.

Subscribed and sworn to before me this 24th day of August, 1897.

JAMES W. FORBIS,
Notary Public in and for the County of Silver Bow, the State of Montana.

Filed Aug. 24th, 1897.

Complainant's Exhibit, "Answer of J. H. Leyson, Admr., to Petition."

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of
ANDREW J. DAVIS, Deceased.

Now comes J. H. Leyson, administrator, with the will annexed of the estate of Andrew J. Davis, deceased, and for showing and answer to the petitions of John E. Davis, administrator of the estate of John A. Davis, deceased, and Henry A. Root et al., for partial distribution in the matter of the estate of Andrew J. Davis, deceased, filed herein on the twenty-third day of August, 1897, respectfully shows to the Court:

First.—That on the eighth day of April, 1895, letters of administration with the will annexed, upon the estate of Andrew J. Davis, deceased, were duly issued to the said J. H. Leyson, which are still in force.

That this administrator with the will annexed caused due and proper notice to creditors to be given and published as required by law, and that more than twelve months have elapsed since his appointment as administrator with the will annexed, and more than ten months have elapsed since the first publication of said notice to the creditors of said estate.

Second.—The administrator with the will annexed further says that from time to time, since his appointment, he has filed in this court statements and accounts

of his administration of the estate of said deceased, showing receipts and expenditures and a general statement of the condition of said estate; and that the last report thereof was filed on the 12th day of July, 1897, and was set for hearing, by order of this court, on the fourth day of September, 1897; that while said last report has not as yet been approved by this court, the administrator refers thereto and says that the same in all respects is true and correct, and that the condition of said estate has not changed in any particular, except in slight and unimportant changes that may have taken place in the receipts and disbursements since the filing of the said last annual statement.

Third.—The administrator with the will annexed further says that he has at the time on hand, in cash, the sum of nine hundred seventy-two thousand ninety-four dollars and forty-seven cents ($972,094.47), and that he also has other assets in the shape of notes, which the administrator with the will annexed estimates at this time to be of the reasonable value of about sixty-seven thousand ($67,000.00) dollars; but the administrator says that while said notes are considered good and collectible to the extent hereinbefore set forth, the same cannot at this time be realized upon.

The administrator says further that he has in his possession all real estate belonging to the estate of said deceased, but that for the purpose of the petitions for distribution and this showing to the Court, the administrator deems it only necessary to refer to the inventory and appraisement heretofore filed in this court for a full description of such real estate and the valuation thereof. How-

ever, the administrator says that such real estate could not be realized upon at this time without sacrifice and injury to the estate.

Fourth.—The administrator with the will annexed further says that the estate of Andrew J. Davis, deceased, is now, and has for a long time past been, the owner of seventeen hundred thirty-seven and six-tenths (1737 6-10) shares of stock in the First National Bank of Helena, of the par value of one hundred ($100) dollars each. That the said First National Bank of Helena has heretofore, being unable to meet its obligations, closed its doors and passed into the hands of a receiver, which receiver is at this time in charge thereof, endeavoring to settle the affairs of said bank. That the administrator cannot at this time say what is the condition of the affairs of said bank, nor what relation its assets bear to its contracts, debts or engagements, and cannot, therefore, say whether or not the estate of Andrew J. Davis, deceased, by reason of its holding said shares in said bank will be held responsible for such contracts, debts or engagements, and if so, to what extent; the administrator in this respect represents to the Court that under the provisions of sections 5151 and 5152 of the Revised Statutes of the United States there is a contingent liability against the estate of Andrew J. Davis, deceased, on account of said shares, including costs and expenses in an amount estimated by the administrator in the sum of one hundred eighty-five thousand ($185,000) dollars.

Fifth.—The administrator with the will annexed further represents that under the provisions of an act of the legislature of the State of Montana, approved March

fourth, 1897, entitled "An act to establish a tax on direct and collateral inheritances, bequests and devises, to provide for its collection and direct the disposition of its proceeds," there is a contingent liability against said estate, estimated in the sum of twenty thousand ($20,000) dollars.

Sixth.—The administrator with the will annexed further says that the State, county and municipal taxes assessed against said estate for the year 1897 are estimated in the sum of forty-five thousand ($45,000) dollars.

Seventh.—The administrator with the will annexed further says that the expenses of administration already incurred and which may hereafter be incurred, including the fees and expenses of the administrator, counsel fees and other current expenses, are estimated at this time in the sum of forty-five thousand ($45,000) dollars, but any unforeseen complications or litigation may increase this amount.

Eighth.—The administrator with the will annexed further says that under the provisions of the last will of Andrew J. Davis, deceased, a bequest was made *the* Thomas Jefferson Davis and Pet Davis and her mother, Miss Bergett, of a life maintenance, and that said parties should have the necessaries of life out of the estate of deceased during their natural lives, the amount thereof to be set apart by the executors of said will; the judgment of the executors of said will as to the amount necessary to set apart for the support of the above-named persons, to be final.

That the executors named in the said will are both dead.

Therefore, the administrator cannot at this time say what the amount of said bequests will be, but asks the Court, if a partial distribution should be ordered, to take the same into consideration, together with other liabilities, contingent or otherwise, herein named, and that sufficient moneys be left in his hands to meet the same.

Ninth.—The administrator with the will annexed further says that this showing and answer is not intended to be construed as an acknowledgment or confession of any absolute liability by reason of the contingent claims hereinbefore set forth, or either of them, or any part thereof, but reserves, with the permission and consent of this Honorable Court, the right and privilege of contesting such contingent claims, and each of them, and the whole thereof, at the proper time.

But with respect to said contingent claims, the administrator says that if the Court should determine that said petitions for partial distribution should be granted, and that a partial distribution of the assets of the estate should be made at this time, that such contingent liabilities and all liabilities hereinbefore set forth should be taken into consideration by the Court, and that sufficient of the cash now in the hands of the administrator with the will annexed should remain in his hands undisturbed to pay and cover the maximum amounts of each and all of said claims, together with costs, in the event it should finally be determined that the estate is liable therefor.

Tenth.—And the administrator with the will annexed further prays that if the Court should decide that a partial distribution is proper at this time, that the Court in arriving at the amount to be distributed shall only order

distributed the cash on hand, after deducting therefrom the maximum possible liabilities of the estate, and costs, as hereinbefore set forth, and that the Court will not consider or include the notes and the real estate as subject to partial distribution, for the reason that the same cannot at this time be realized upon without loss and injury to the estate.

Eleventh.—And the administrator further says that since his appointment by this Court as administrator with the will annexed of said estate, more than two years since, he has devoted most of his time and attention to the management and preservation and administration of the property and affairs of said deceased; that large and varied interests have been involved which require great care and attention in his part in the proper discharge of his duties, and by reason whereof the administrator has been compelled to neglect his private affairs.

That the administrator with the will annexed has received nothing for his fees or expenses incurred in the premises. That such fees and expenses are, under the law, preferred claims. That if a payment on account of such fees and expenses be authorized by this Court at this time, out of the residue remaining on hand after the payment of any partial distribution that may be ordered by the Court, the taxes payable upon such residue will be proportionately reduced without injury to the estate or the parties interested therein.

Wherefore, the administrator with the will annexed, asks:

First.—That the Court in considering whether or not a partial distribution shall be made, will take into con-

sideration the amount of cash on hand, the maximum amount of possible liabilities of said estate, and, if a partial distribution be ordered, that sufficient be left of said cash in the hands of said administrator to cover and pay said possible liabilities and costs.

Second.—That if the Court should order a partial distribution, an order be made at the same time, directing a payment upon account of the fees and expenses of the administrator out of the residue remaining in his hands after the payment of any partial distribution that may be ordered, and that such payment upon account of such fees and expenses be in such an amount as the Court may consider safe and just in consideration of the services performed, and that such payment be only considered upon account and not as determining the amount to which said administrator may be finally entitled, which amount may be hereafter determined by the Court, and the payment ordered made at this time be considered as a payment upon the fees and expenses to which the Court may finally determine that the administrator is entitled.

JOHN H. LEYSON,
Administrator with the Will Annexed of the Estate of Andrew J. Davis, Deceased.

JAMES W. FORBIS,
Attorney for said Administrator.

The State of Montana,
County of Silver Bow. } ss.

J. H. Leyson, being duly sworn, on oath says that he is the administrator with the will annexed of the estate of Andrew J. Davis, deceased; that he has read the fore-

going answer and showing and knows the contents thereof, and that the facts therein stated are true of his own knowledge, except as to such matters and things as are therein stated on information and belief, and as to those matters he believes it to be true.

JOHN H. LEYSON.

Subscribed and sworn to before me this 26th day of August, 1897.

JAMES W. FORBIS,

Notary Public in and for the County of Silver Bow, the State of Montana.

[Endorsed]: In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow. In the Matter of the Estate of Andrew J. Davis, Deceased. Answer of J. H. Leyson, Administrator, to Petitions for Partial Distribution. Filed Aug. 2, 1897. Clinton C. Clark, Clerk. R. E. Leonard, Deputy Clerk.

Complainant's Exhibit, "Decree of Partial Distribution."

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of
ANDREW J. DAVIS, Deceased.

Be it remembered that on this 26th day of August, 1897, the petition of John E. Davis, as administrator of the estate of John A. Davis, deceased, for a partial distribution of said estate, and the joint and several petition of

Diana Davis, Sarah M. Cummings, Harriet Wood, Elizabeth S. Bowdoin, and John A. Bowdoin, her husband, Calvin P. Davis, Ellen S. Cornue, and Joshua G. Cornue, her husband, Henry A. Root and Rosine B. Root, his wife, Mary L. Dunbar, Elizabeth A. Smith and J. Howard Smith, her husband, Harriet R. Sheffield, Henry A. Davis, Elizabeth S. Ladd and Charles H. Ladd, her husband, Andrew J. Davis, Jr., and Helen M. Davis, his wife, John E. Davis and Tenie B. Davis, his wife, Edward A. Davis and Mary A. Davis, his wife, Charles G. Davis and Gertrude F. Davis, his wife, George W. Davis, Morris A. Davis and Thea Jane Davis, being all of the heirs and next of kin of Andrew J. Davis, deceased, who are interested in his estate, for a partial distribution of said estate, coming on to be heard pursuant to orders of this Court duly made and filed on the 24th day of August, 1897, fixing this day for the hearing thereof, and pursuant to notice thereof pursuant to said orders, proof of the due posting thereof being made to the Court, and upon reading and filing the answer and report of John H. Leyson, as administrator with the will annexed of Andrew J. Davis, deceased, and upon due proofs submitted to the Court in support of said petitions, and upon due consideration, and it appearing that all of the said petitioners, and the said John H. Leyson, as such administrator, and all of the parties interested in said estate, have appeared by their respective attorneys, or otherwise, and have consented to the distribution hereinafter decreed; and it further appearing that due and proper notice to the creditors of said estate has been regularly given in pursuance of the statutes in such case made and provided, and that more than twelve

months have elapsed since the appointment of said administrator, and that more than ten months have elapsed since the first publication of notice to the creditors of said estate, and that no claims have been proven up and allowed against said estate which have not been fully paid, and that no injury or damage whatever can accrue by the partial distribution of said estate as requested by your petitioners.

And it further appearing that John H. Leyson, as such administrator, has now on hand, in cash, the sum of nine hundred and seventy-two thousand and ninety-four dollars and forty-seven cents ($972,094.47), besides a large amount of other property as shown by the inventory filed herein, and that the petitioners request now the distribution of the sum of six hundred and seventy thousand dollars ($670,000), and that the same can safely be now ordered to be distributed as prayed for, without damage or injury to said estate or any person interested therein.

And it further appearing that the rights and interests of the said parties, and of the said petitioners, in the estate of said Andrew J. Davis, deceased, are as follows, to wit: Subject to the legacies in said will contained, to Thomas Jefferson Davis, Pet Davis, and Miss Berget, and the expenses of administration of the estate of Andrew J. Davis, deceased; the said John E. Davis, as administrator of the estate of John A. Davis, deceased, is entitled to have and receive two hundred eleven-hundredths (200-1100) of said estate in kind; the said Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue, and Joshua A. Cornue are entitled to have and receive two

hundred and fifty eleven-hundredths (250-1100) of said estate in kind; the said Harriet R. Sheffield and Henry A. Davis are entitled to have and receive forty-four eleven-hundredths (44-1100) of said estate in kind; the said Elizabeth S. Bowdoin, Calvin P. Davis, and Harriet Wood are each entitled severally to have and receive fifty eleven-hundredths (50-1100) of said estate in kind; and the said Elizabeth A. Smith is entitled to have and receive twenty-five eleven-hundredths (25-1100) of said estate in kind; but that no portion of the real estate owned by the said Andrew J. Davis, deceased, and situated in the State of Iowa, is to comprise any portion of the said estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith are entitled to; nor are they to be charged with any part of the bequest given to the said Thomas Jefferson Davis in said will, but that the same shall be settled as to them as if no bequest had been made.

And it further appearing that finally Andrew J. Davis, Jr., and Charles H. Palmer, trustees appointed by the compromise agreement of certain heirs of the said Andrew J. Davis, deceased, dated April 28th, 1893, are entitled to have and receive four hundred and thirty-one eleven-hundredths (431-1100) of said estate in kind, to be held and disposed of by them pursuant to the provisions of said trust, it is now hereby ordered, adjudged, and decreed that the rights and the interests of the respective parties are as hereinbefore set forth.

It is further ordered, adjudged, and decreed that the prayers of said petitioners be, and the same are hereby,

granted, and that John H. Leyson, as administrator of the estate of Andrew J. Davis, deceased, be, and he hereby, is ordered and directed forthwith to distribute and pay over the sum of six hundred and seventy-thousand (670,000) dollars of the cash remaining in his hands, to the following persons or their agents or legal representatives, and in the following proportions, to wit:

To the said Andrew J. Davis, Jr., and Charles H. Palmer, the said trustees, the sum of two hundred and sixty-two thousand five hundred and eighteen and eighteen one-hundredths dollars ($262,518.18).

To the said Henry A. Root, Sarah M. Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue, and Joshua G. Cornue, the sum of one hundred and fifty-two thousand two hundred and seventy-two and seventy-three one-hundredths dollars ($152,272.73).

To the said John E. Davis, as administrator of the estate of John A. Davis, deceased, the sum of one hundred and twenty-one thousand eight hundred and eighteen and nineteen one-hundredths dollars ($121,818.19).

To Charles M. Demond and C. P. Drennen, attorneys for Elizabeth S. Bowdoin, Calvin P. Davis, and Harriet Wood, and for the said Elizabeth S. Bowdoin, Calvin P. Davis, and Harriet Wood, the sum of ninety-one thousand three hundred and sixty-three and sixty-four one-hundredths dollars ($91,363.64).

To the said Elizabeth A. Smith or J. Howard Smith, her attorney in fact, the sum of fifteen thousand two hundred and twenty-seven and twenty-seven one-hundredths dollars ($15,227.27), and that the sum of twenty-six thousand seven hundred and ninety-nine and ninety-nine one-

hundredths dollars ($26,799.99), representing the share of the said Harriet R. Sheffield and Henry A. Davis, be paid over as follows: Fifteen per cent (15) thereof to George F. Shelton and eighty-five per cent (85) thereof to Martin J. Keogh, the attorneys for the said Harriet R. Sheffield and Henry A. Davis.

It is further ordered, adjudged, and decreed that John H. Leyson, as administrator aforesaid, pay to himself from the funds remaining in his hands the additional sum of twenty-five thousand ($25,000) dollars on account of his fees and expenses as such administrator.

It is further ordered, adjudged, and decreed that the legacy given in said will of Andrew J. Davis, deceased, to Pet Davis is hereby fixed at the sum of five hundred ($500) dollars; and the legacy given in said will to Miss Berget, otherwise known as Caroline Berget Smith, be, and the same is hereby, fixed at the sum of four thousand five hundred (4,500) dollars, and said John H. Leyson, as such administrator, is hereby ordered and directed to pay said five hundred dollars ($500) to Oliver M. Hall, administrator of said Pet Davis, and to pay said sum of four thousand five hundred (4,500) dollars to James M. Hinkle, he having submitted to the Court satisfactory proof of sale and transfer to him of said legacy given in said will to the said Caroline Berget Smith, prior to her death.

It is further ordered, adjudged, and decreed that the legacy given in said will of Andrew J. Davis, deceased, to Thomas Jefferson Davis, be, and the same is hereby, fixed at the sum of ten thousand dollars. It appearing to the satisfaction of the Court that all of the interest of said Thomas Jefferson Davis in said estate of Andrew

J. Davis now belongs to Charles H. Palmer and Andrew J. Davis, as trustees, it is therefore further ordered, adjudged, and decreed that said Charles H. Palmer and Andrew J. Davis, as trustees, shall receive said sum.

And it further appearing to the Court that by the consent and agreement of all of the parties for whom said Charles H. Palmer and Andrew J. Davis are trustees, and the consent and agreement of said trustees, all of the interest of said Thomas Jefferson Davis as above determined shall be included in the four hundred and thirty-one eleven-hundredths (431-1100) of such part of the estate as is distributed hereunder to the said Charles H. Palmer and Andrew J. Davis.

It is further ordered, adjudged, and decreed that the interest of the said Thomas Jefferson Davis in and to the estate of said Andrew J. Davis, deceased, fixed as above, be distributed to the said Charles H. Palmer and Andrew J. Davis, trustees, as a part of the four hundred and thirty-one eleven-hundredths (431-1100) of that part of said estate distributed under this order to them, and upon payment to them of said four hundred and thirty-one eleven-hundredths (431-1100) of the distribution made hereunder, said Charles H. Palmer and Andrew J. Davis shall receipt to said administrator in full for the interest of said Thomas Jefferson Davis in the estate of Andrew J. Davis, deceased.

Dated at Butte City, Montana, August 26th, 1897.

JOHN LINDSAY,

Judge Second Judicial District Court, State of Montana, Silver Bow County.

[Endorsed as follows]: 285. In the Second Judicial District Court, Silver Bow County, Montana. In the Matter of the Estate of Andrew J. Davis, Deceased. Decree of Partial Distribution. F, page 304. Filed August 26th, 1897. Clinton C. Clark, Clerk. By R. E. Leonard, Deputy Clerk.

Complainant's Exhibit, "Petition for Partial Distribution, and for an Order for Delivery of Real Estate."

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of
ANDREW J. DAVIS, Deceased.

To the Honorable Judge of the District Court aforesaid:

Your petitioners, Sarah M. Cummings, Harriet Wood, Elizabeth S. Bowdoin and John A. Bowdoin, her husband, Calvin P. Davis, Ellen S. Cornue, and Joshua G. Cornue, her husband, Henry A. Root and Rosine B. Root, his wife, Elizabeth A. Smith and J. Howard Smith, her husband, being heirs and next of kin of Andrew J. Davis, deceased and who are interested in his estate, each for himself or herself and jointly and severally, and Andrew J. Davis, Jr., and Charles H. Palmer, trustees under the compromise agreement dated April 28th, 1893, heretofore approved by this Court, jointly and severally petition this Court and show unto your Honor:

I.

That the said Andrew J. Davis died on the 11th day of March, 1890, being at that time a resident of the city of

Butte, in said county and State, seised and possessed of a large estate, real, personal, and mixed, situated in said county and elsewhere.

That at the time of the death of the said Andrew J. Davis, he left surviving him the following heirs at law and next of kin: Elizabeth S. Bowdoin, a sister, residing at Springfield in the State of Massachusetts; Harriet Wood, a sister, residing at Springfield in said last named State; Sarah Maria Cummings, a sister, residing at Ware in said State; Diana Davis, a sister, residing at the town of Somers, in the State of Connecticut; Erwin Davis, a brother, residing at New York City, in the State of New York; Calvin P. Davis, a brother, residing at Sebastopol in the State of California; John A. Davis, a brother, now deceased, formerly residing at Butte, in the State of Montana; Elizabeth S. Ladd, a niece, residing at Springfield in the State of Massachusetts, a daughter of Sophronia Firman, a sister of said deceased; Harriet R. Sheffield, a niece residing at Northport in the State of New York, and Henry A. Davis, a nephew, residing at Munsen in the State of Massachusetts, being children of Asa Davis, a brother of said deceased; Henry A. Root, a nephew, residing at Butte, in the State of Montana, and Ellen S. Cornue, a niece, residing at Croton Falls in the State of New York, being children of Annie C. Root, a sister of the said Andrew J. Davis, deceased; Mary L. Dunbar, a niece residing at Springfield in the State of Massachusetts, and Elizabeh A. Smith, a niece, residing at Claremont, in the State of California, being children of Roxanna Davis, deceased, a sister of the said Andrew J. Davis, deceased, and that the above-named persons com-

prised all of the heirs at law and next of kin of the said deceased, Andrew J. Davis.

II.

That on the 20th day of July, A. D. 1890, the said John A. Davis, being a brother of the said Andrew J. Davis, deceased, and in all respects duly entitled and qualified in that behalf, filed in this court a certain instrument in writing, purporting to be the last will and testament of the said Andrew J. Davis, deceased, and in connection therewith his petition in due form of law, for probate of said alleged will and testament, and for his appointment as administrator of the estate of said Andrew J. Davis, deceased, with the said alleged last will and testament annexed.

That the said John A. Davis, with the exception of a few small bequests, was the sole legatee, devisee, and beneficiary under said alleged last will and testament.

III.

That after due and proper notice in accordance with the statutes in such case made and provided, for the probate of said alleged last will and testament, and within the time prescribed therefor, the said Henry A. Root and Sarah Maria Cummings interposed in writing their objection to the probate thereof, in which said contest the said Elizabeth S. Ladd, Mary L. Dunbar, and Ellen S. Cornue were interested, and the said Harriet R. Sheffield and Henry A. Davis likewise interposed their objections in writing to the probate thereof.

That thereafter, on the 24th day of January, 1893, the said proponent of said alleged last will and testament,

John A. Davis, died intestate, leaving surviving him as sole heirs at law and next of kin, his wife, Thea Jane Davis, Edward A. Davis, George W. Davis, Charles G. Davis, Morris A. Davis, Andrew J. Davis, Jr., and John E. Davis, all sons of the said John A. Davis, deceased, all of whom are now living.

And on the 11th day of March, 1893, his said son, John E. Davis, being entitled and qualified in all respects to administer upon the estate of his said father, was duly appointed administrator thereof, and letters of administration were thereupon issued to him, the said John E. Davis, who is now and ever since hath been the duly qualified and acting administrator of the estate of said last named deceased, and as such was substitued as proponent of said alleged last will and testament.

That thereafter, by the consent, compromise, and agreement of all of the parties to the said contests, said alleged last will and testament was duly admitted to probate, and a decree of this Court on the 27th day of March, A. D. 1895, duly rendered and entered, probating said will upon the necessary and proper proofs adduced in pursuance of said contests, compromises, and agreements and defining therein the respective rights and interests coming to the said parties in pursuance of the said compromises and agreements.

IV.

That on the 8th day of April, A. D. 1895, John H. Leyson was duly appointed administrator of the estate of Andrew J. Davis, deceased, with the will annexed, and letters of administration duly issued to him as such, which are still in full force and effect; and that the said

John H. Leyson hath ever since been and now is the duly appointed and qualified and acting administrator of the said estate of said deceased; that due and proper notice to the creditors of the said estate has been regularly given in pursuance of the statute in such case made and provided, and that more than twelve months have elapsed since the appointment of such administrator, and that more than ten months have elapsed since the first publication of said notice to creditors of said estate.

V.

That thereafter, to wit, and within the time allowed by the statutes in such case made and provided, the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood, Elizabeth A. Smith, and Diana Davis, being all the other heirs at law and next of kin of said Andrew J. Davis, deceased, except the said Erwin Davis, for the purpose of contesting the validity of said alleged will in this court, in which the said will was proven, filed their petitions in writing, containing their allegations against the validity of said will, and praying that the probate thereof be revoked.

VI.

That the said Erwin Davis filed no contest against the probating of said alleged last will and testament, nor did he within the time prescribed by law contest said will or the validity thereof, or file any petition for that purpose after the order and decree was entered admitting said will to probate; that all contests so interposed were dismissed and the probate of said will duly confirmed and in pursuance of the compromise agreements of all the re-

spective parties in interest and of all your petitioners; that the rights and interests of the parties and of your petitioners in the estate of said Andrew J. Davis, deceased, are as follows, to wit: Subject to the legacies in said will contained, to Thomas Jefferson Davis, Pet Davis, and Miss Berget and the expenses of administration of said estate of Andrew J. Davis, deceased; the said John E. Davis, as administrator of the estate of John A. Davis, deceased, is entitled to have and receive two hundred eleven-hundredths (200-1100) of said estate in kind; the said Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue are entitled to have and receive two hundred and fifty eleven-hundredths (250-1100) of said estate in kind; the said Harriet R. Sheffield and Henry A. Davis are entitled to have and receive forty-four eleven-hundredths (44-1100) of said estate in kind; the said Elizabeth S. Bowdoin, Calvin P. Davis, and Harriet Wood are each entitled severally to have and receive fifty eleven-hundredths (50-1100) of said estate in kind; and the said Elizabeth A. Smith is entitled to have and receive twenty-five eleven-hundredths (25-1100) of said estate in kind; but by the terms of said compromise agreements it is provided that no portion of the real estate owned by the said Andrew J. Davis, deceased, and situated in the State of Iowa, shall comprise any portion of the estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood, and Elizabeth A. Smith are entitled to in pursuance thereof; nor are they to be chargeable with any part of the bequest given to the said Thomas Jeffer-

son Davis in said will, but the same shall be settled as to them as if no bequest had been made. And finally, Andrew J. Davis, Jr., and Charles H. Palmer, trustees, appointed by the compromise agreement dated April 28, 1893, are entitled to have and receive four hundred and thirty-one eleven-hundredths (431-1100) of said estate in kind, to be held and disposed of by them pursuant to the provisions of said trust.

That on the 26th day of August, 1897, a decree was duly made and entered in said estate in the above entitled court adjudging that the rights and interests of said respective parties were as hereinbefore set forth; and further adjudging and decreeing and fixing the legacy given in said will of Andrew J. Davis, deceased, to Pet Davis at the sum of five hundred dollars ($500), and the legacy given in said will to Miss Berget, otherwise known as Caroline Berget Smith at the sum of four thousand five hundred dollars ($4,500); and the legacy given in said will to Thomas Jefferson Davis at the sum of ten thousand dollars ($10,000). That since the making and entering of said decree the said legacies and each of them have been paid by said administrator.

VII.

That the decedent, Andrew J. Davis, died seised and possessed of certain real estate situated in the State of Montana, and that none of such real estate, or the rents, issues, or profits thereof, have been necessary or have been used by the administrator for the payment of the debts of said estate or the expenses of administration.

VIII.

That after said twelve months had elapsed since the appointment of said administrator, and that after more than ten months had elapsed since the publication of said notice to creditors as hereinbefore stated, no claims have been proven up and allowed against the said estate which have not been fully paid; that all taxes which have attached to or accrued against the said estate have been fully paid, and that the rents, issues, and profits of the real estate of said estate are not necessary to be received by the said administrator wherewith to pay the debts of the decedent, and that, as your petitioners are informed and believe, it will not be necessary to sell said real estate for the payment of such debts. That there is now a large amount of money on hand and in the possession and control of the administrator, to wit: The sum of over fifty thousand dollars, besides a large amount of other property as shown by the inventory filed herein, and that there are no other claims or demands whatsoever, except those involving the expenses and costs of administration, sufficient funds for the payment of which are now in the hands of the administrator of said estate. That your petitioners hereinbefore named and the said heirs of John A. Davis, deceased, and Harriet R. Sheffield, Henry A. Davis, Mary L. Dunbar, and Elizabeth S. Ladd are the only heirs at law and next of kin entitled to participate and share in the division of the said estate.

And your peitioners further show that the possession of all of the real estate of decedent can safely be delivered to, and the said real estate distributed to your petitioners and the other heirs at law entitled thereto.

Wherefore, your petitioners pray that a time and place be fixed for the hearing of said petition; that an order fixing the notice thereof be given in accordance with the statute in such case made and provided; and that upon such hearing an order and decree be made that the administrator deliver to the parties entitled thereto all and singular the real estate belonging to the said estate, or in which the said estate may have any interest, in the State of Montana; and that a further decree be made for a distribution of said real estate belonging to the said estate, or in which the said estate may have any interest, in the State of Montana, and that your petitioners have their respective shares, parts, and portions thereof, to be held by them as owners or tenants in common; that such order and further relief be had as may be just and proper.

HENRY A. ROOT.
ROSINE B. ROOT.
By HENRY A. ROOT,
Her Attorney in Fact,
SARAH M. CUMMINGS,
By HENRY A. ROOT,
Her Attorney in Fact,
ELLEN S. CORNUE and
JOSHUA G. CORNUE,
By HENRY A. ROOT,
Their Attorney in Fact,
CHARLES H. PALMER,
Trustee,
By HENRY A. ROOT,
His Attorney,
ANDREW J. DAVIS,
Trustee,

ELIZABETH A. SMITH,
By J. HOWARD SMITH and
THOMPSON CAMPBELL,
Her Attorneys.

HARRIET WOOD,
ELIZABETH S. BOWDOIN, and
JOHN A. BOWDOIN, and
CALVIN P. DAVIS.
By C. P. DRENNEN and
C. M. DEMOND,
Their Attorneys.

The State of Montana, }
County of Silver Bow. } ss.

Henry A. Root makes oath and says that he is one of the petitioners herein for partial distribution, and for an order for delivery of real estate, of the estate of Andrew J. Davis, deceased, that he has read the foregoing petition and knows the contents thereof and that the matters and things therein stated are true of his own knowledge, except as to those matters therein stated on information and belief, and that as to those he believes it to be true.

HENRY A. ROOT.

Subscribed and sworn to before me this sixth day of December, A. D. 1897.

JOHN BEAN,
Notary Public, in and for Silver Bow County, Montana.

Filed Dec. 10th, 1897.

Complainant's Exhibit, "Petition for Partial Distribution, and for an Order for Delivery of Real Estate."

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of
ANDREW J. DAVIS, Deceased.

To the Honorable Judge of the istrict Court, aforesaid:

Your petitioners, Harriet R. Sheffield and Henry A. Davis, heirs at law and next of kin of said deceased, and being interested in the estate of said Andrew J. Davis, deceased, respectively represent unto this Court that they have read the petition of Sarah M. Cummings, Harriet Wood, Elizabeth S. Bowdoin, and John A. Bowdoin, her husband, Calvin P. Davis, Ellen S. Cornue and Joshua G. Cornue, her husband, Henry A. Root and Rosine B. Root, his wife, Elizabeth A. Smith and J. Howard Smith, her husband, being heir at law and next of kin of Andrew J. Davis, deceased, for a partial distribution, and for an order for delivery of real estate, heretofore filed in this court and cause (a true copy of which said petition is hereto attached marked Exhibit "A," and made a part of this petition), and that they are fully familiar with all and singular the allegations contained in said petition, and that they jointly and severally consent to the entry of the order as in said petition prayed for, and also join in said petition.

HARRIET H. SHEFFIELD and
HENRY A. DAVIS.

By W. E. CULLEN,
Attorney for Petitioners.

The State of Montana, } ss.
County of Lewis and Clarke. }

W. E. Cullen, being duly sworn says: That he is one of the attorneys for the petitioners hereinabove named; that the said petitioners are absent from the county of Lewis and Clarke Montana, where affiant resides, and where said cause is pending, and for that reason are unable to verify said petition, and, therefore, the same is verified by affiant as one of the attorneys for said petitioners; that he has read the foregoing petition and knows the contents thereof, and that the matters stated therein are true to the best knowledge, information and belief of affiant.

W. E. CULLEN.

Subscribed and sworn to before me this .... day of December, A. D. 1897.

[Seal] JNO. K. SCOTT,
Notary Public in and for the County of Lewis and Clarke,
State of Montana.

NOTE.—Attached to this petition as Exhibit "A" is a copy of the petition of Sarah M. Cummings and others, for a partial distribution and for delivery of the real estate, verified by Henry A. Root, December 6, 1897, which last mentioned petition is not again set forth, inasmuch as a copy of it has already been exemplified and is shown in full immediately preceding this petition of Harriet R. Sheffield and Henry A. Davis.

CLINTON C. CLARK,
Clerk.

By James F. Wilkins,
Deputy Clerk.

Complainant's Exhibit, "Petition for Partial Distribution, and for an Order for Delivery of Real Estate."

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of
ANDREW J. DAVIS, Deceased.

To the Honorable Judge of the District Court, aforesaid:

Your petitioner, John E. Davis, administrator of the estate of John A. Davis, deceased, respectfully represents unto this Court that he has read the petition of Sarah M. Cummings, Harriet Wood, Elizaebth S. Bowdoin, and John A. Bowdoin, her husband, Calvin P. Davis, Ellen S. Cornue and Joshua G. Cornue, her husband, Henry A. Root and Rosina B. Root, his wife, Elizabeth A. Smith and J. Howard Smith, her husband, being heirs at law and next of kin of Andrew J. Davis, deceased, for a partial distribution, and for an order for delivery of real estate, heretofore filed in this court and cause (a true copy of which said petition is hereto attached marked exhibit "A," and made a part of this petition); that he is the duly appointed, qualified, and acting administrator of the said John A. Davis, deceased; that as such administrator representing the estate of John A. Davis, deceased, your petitioner represents unto this Court that he is fully familiar with all and singular the allegations contained in said petition, and that, as such administrator, he hereby con-

sents to the entry of the order as therein prayed for, and also joins in said petition.

JOHN E. DAVIS,
Administrator of the Estate of John A. Davis, Deceased.

The State of Montana, }
County of Silver Bow. } ss.

———————, being duly sworn says: That he is one of the attorneys for John E. Davis, administrator of the estate of John A. Davis, deceased; that the said petitioner, above named, is absent from the county of Silver Bow, Montana, where affiant resides, and where said cause is pending, and for that reason is unable to verify said petition, and, therefore, the same is verified by affiant as one of the attorneys of said administrator; that he has read the foregoing petition and knows the contents thereof, and that the matters stated therein are true to the best knowledge, information and belief of affiant.

———————

Subscribed and sworn to before me this —— day of December, A. D. 1897.

———————

Notary Public, Silver Bow, Montana.

Complainant's Exhibit, "Petition for Partial Distribution, and for an Order for Delivery of Real Estate."

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of
ANDREW J. DAVIS, Deceased.

To the Honorable Judge of the District Court, aforesaid:

Your petitioners, Sarah M. Cummings, Harriet Wood, Elizabeth S. Bowdoin and John A. Bowdoin, her husband, Calvin P. Davis, Ellen S. Cornue and Joshua G. Cornue, her husband, Henry A. Root and Rosina B. Root, his wife, Elizabeth A. Smith and J. Howard Smith, her husband, being heirs and next of kin of Andrew J. Davis, deceased, and who are interested in his estate, each for himself or herself and jointly and severally, and Andrew J. Davis, Jr., and Charles H. Palmer, trustee under the compromise agreement dated April 28th, 1893, heretofore approved by this Court, jointly and severally petition this Court and show unto your Honor:

I.

That the said Andrew J. Davis died on the 11th day of March, 1890, being at that time a resident of the city of Butte, in said county and State, seised and possessed of a large estate, real, personal and mixed, situated in said county and elsewhere,

That at the time of the death of the said Andrew J. Davis, he left surviving him the following heirs at law

and next of kin: Elizabeth S. Bowdoin, a sister, residing at Sprinfield, in the State of Massachusetts; Harriet Wood, a sister, residing at Springfield in said last named State; Sarah Maria Cummings, a sister, residing at Ware in said State; Diana Davis, a sister, residing at the town of Somers, in the said State of Connecticut; Erwin Davis, a brother, residing at New York City, in the State of New York; Calvin P. Davis, a brother, residing at Sebasopol in the State of California; John A. Davis, a brother, now deceased, formerly residing at Butte, in the State of Montana; Elizabeth S. Ladd, a niece, residing at Springfield in the State of Massachusetts, a daughter of Sophronia Firman, a sister of said deceased; Harriet R. Sheffield, a niece residing at Northport in the State of New York, and Henry A. Davis, a nephew, residing at Munsen in the State of Massachusetts, being children of Asa Davis, a brother of said deceased; Henry A. Root, a nephew, residing at Butte, in the State of Montana, and Ellen S. Cornue, a niece, residing at Croton Falls in the State of New York, being children of Annie C. Root, a sister of the said Andrew J. Davis, deceased; Mary L. Dunbar, a niece residing at Springfield in the State of Massachusetts, and Elizabeth A. Smith, a niece, residing at Claremont, in the State of California, being children of Roxanna Davis, a sister of the said Andrew J. Davis, deceased, and that the above named persons comprised all of the heirs at law and next of kin of the said deceased, Andrew J. Davis.

II.

That on the 20th day of July, A. D. 1890, the said John A. Davis, being a brother of the said Andrew J. Davis,

deceased, and in all respects duly entitled and qualified in that behalf, filed in this court a certain instrument in writing, purporting to be the last will and testament of the said Andrew J. Davis, deceased, and in connection therewith his petition in due form of law, for probate of said alleged will and testament, and for his appointment as administrator of the estate of said Andrew J. Davis, deceased, with the said alleged last will and testament annexed.

That the said John A. Davis, with the exception of a few small bequests, was the sole legatee, devisee, and beneficiary under said alleged last will and testament.

III.

That after due and proper notice in accordance with the statutes in such case made and provided, for the probate of said alleged last will and testament, and within the time prescribed therefor, the said Henry A. Root and Sarah Maria Cummings interposed in writing their objections to the probate thereof, in which said contest the said Elizabeth S. Ladd, Mary L. Dunbar, and Ellen S. Cornue were interested, and the said Harriet R. Sheffield and Henry A. Davis likewise interposed their objections in writing to the probate thereof.

That thereafter, on the 24th day of January, 1893, the said proponent of said alleged last will and testament, John A. Davis, died intestate, leaving surviving him as sole heirs at law and next of kin, his wife, Thea Jane Davis, Edward A. Davis, George W. Davis, Charles G. Davis, Morris A. Davis, Andrew J. Davis, Jr., and John E. Davis, all sons of the said John A. Davis, deceased, all of whom are now living.

And on the 11th day of March, 1893, his said son, John E. Davis, being entitled and qualified in all respects to administer upon the estate of his said father, was duly appointed administrator thereof, and letters of administration were thereupon issued to him, the said John E. Davis, who is now and ever since hath been the duly qualified and acting administrator of the estate of said last named deceased, and as such was substituted as proponent of said alleged last will and testament.

That thereafter, by the consent, compromise, and agreement of all of the parties to the said contests, said alleged last will and testament was duly admitted to probate, and a decree of this Court on the 27th day March, A. D. 1895, duly rendered and entered, probating said will upon the necessary and proper proofs adduced in pursuance of said contests, compromises, and agreements and defining therein the respective rights and interests coming to the said parties in pursuance of the said compromise and agreements.

IV.

That on the 8th day of April, A. D. 1895, John H. Leyson was duly appointed administrator of the estate of Andrew J. Davis, deceased, with the will annexed, and letters of administration duly issued to him as such, which are still in full force and effect; and that the said John H. Leyson hath ever since been and now is the duly appointed and qualified and acting administrator of the said estate of said deceased; that due and proper notice to the creditors of the said estate has been regularly given in pursuance of the statute in such case made and

provided, and that more than twelve months have elapsed since the appointment of such administrator, and that more than ten months have elapsed since the first publication of said notice to reditors of said estate.

V.

That thereafter, to wit, and within the time allowed by the statutes in such case made and provided, the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood, Elizabeth A. Smith and Diana Davis, being all the other heirs at law and next of kin of said Andrew J. Davis, deceased, except the said Erwin Davis, for the purpose of contesting the validity of said alleged will in this Court, in which the said will was proven, filed their petitions in writing, containing their allegations against the validity of said will, and praying that the probate thereof be revoked.

VI.

That the said ErwinDavis filed no contest against the probating of said alleged last will and testament, nor did he within the time prescribed by law contest said will or the validity thereof, or file any petition for that purpose after the order and decree was entered admitting said will to probate; that all contests so interposed were dismissed and the probate of said last will duly confirmed and in pursuance of the compromise agreements of all the respective parties in interest and of all your petitioners. That the rights and interests of the parties and of your petitioners in the estate of said Andrew J. Davis, deceased, are as follows, to wit: Subject to the legacies in said will contained, to Thomas Jefferson Da-

vis, Pet Davis, and Miss Bergett, and the expenses of administration of said estate of Andrew J. Davis, deceased; the said John E. Davis, as administrator of the estate of John A. Davis, deceased, is entitled to have and receive two hundred eleven-hundredths (200-1100) of said estate in kind; the said Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue are entitled to have and receive two hundred and fifty eleven-hundredths (200-1100) of said estate in kind; the said Harriet R. Sheffield and Henry A. Davis, are entitled to have and receive forty-four eleven-hundredths (44-1100) of said estate in kind; the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood are each entitled severally to have and reeive fifty eleven-hundredths (50-1100) of said estate in kind; and the said Elizabeth A. Smith is entitled to have and receive twenty-five eleven-hundredths (25-1100) of said estate in kind; but by the terms of said compromise agreements it is provided that no portion of the real estate owned by the said Andrew J. Davis, deceased, and situated in the State of Iowa, shall comprise any portion of the estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood and Elizabeth A. Smith are entitled to in pursuance thereof; nor are they to be chargeable with any part of the bequest given to the said Thomas Jefferson Davis in said will, but the same shall be settled as to them as if no bequest had been made. And finally, Andrew J. Davis, Jr., and Charles H. Palmer, trustees, appointed by the compromise agreement dated April 28, 1893, are entitled to have and receive four hun-

dred and thirty-one eleven-hundredths (431-1100) of said estate in kind, to be held and disposed of by them pursuant to the provisions of said trust.

That on the 26th day of August, 1897, a decree was duly made and entered in said estate in the above entitled court, adjudging that the rights and interests of said respective parties were as hereinbefore set forth; and further adjudging and decreeing and fixing the legacy given in said will of Andrew J. Davis, deceased, to Pet Davis at the sum of five hundred dollars ($500) and the legacy given in said will to Miss Berget, otherwise known as Caroline Berget Smith, at the sum of four thousand five hundred dollars ($4,500); and the legacy given in said will to Thomas Jefferson Davis at the sum of ten thousand dollars ($10,000). That since the making and entering of said decree the said legacies and each of them have been paid by said administrator.

VII.

That the deceased, Andrew J. Davis, died seised and possessed of certain real estate situated in the State of Montana, and that none of such real estate, or the rents, issues, or profits thereof, have been necessary or have used by the administrator for the payment of the debts of said estate or the expenses of administration.

VIII.

That after said twelve months had elapsed since the appointment of said administrator, and that after more than ten months had elapsed since the publication of said notice to creditors as hereinbefore stated, no claims have been proven up and allowed against the said estate

which have not been fully paid; that all taxes which have attached to or accrued against the said estate have been fully paid, and that the rents, issues, and profits of the real estate of said estate are not necessary to be received by the said administrator wherewith to pay the debts of the decedent, and that, as your petitioners are informed and believe, it will not be necessary to sell said real estate for the payment of such debts. That there is now a large amount of money on hand and in the possession and control of the said administrator, to wit: The sum of over fifty thousand dollars, besides a large amount of other property as shown by the inventory filed herein, and that there are no other claims or demands whatsoever, except those involving the expenses and costs of administration, sufficient funds for the payment of which are now in the hands of the administrator of said estate. That your petitioners hereinbefore named, and the said heirs of John A. Davis, deceased, and Harriet R. Sheffield, Henry A. Davis, Mary L. Dunbar, and Elizabeth S. Ladd are the only heirs at law and next of kin entitled to participate and share in the division of the said estate.

And your petitioners further show that the posession of all of the real estate of decedent can safely be delivered to, and the said real estate distributed to your petitioners and the other heirs at law entitled thereto.

Wherefore, your petitioners pray that a time and place be fixed for the hearing of said petition; that an order fixing the notice thereof be given in accordance with the statute in such case made and provided; and that upon said hearing an order and decree be made that the ad-

ministrator deliver to the parties entitled thereto all and singular the real estate belonging to the said estate, or in which the said estate may have any interest, in the State of Montana, and that a further decree be made for a distribution of said real estate belonging to the said estate, or in which the said estate may have any interest, in the State of Montana, and that your petitioners have their respective shares, parts and portions thereof, to be held by them as owners or tenants in common; that such other and further relief be had as may be just and proper.

HENRY A. ROOT.
ROSINA B. ROOT.
By HENRY A. ROOT, Her Attorney in Fact.
SARAH M. CUMMINGS.
By HENRY A. ROOT, Her Attorney in Fact.
ELLEN S. CORNUE and
JOSHUA G. CORNUE.
By HENRY A. ROOT,
Their Attorney in Fact.
CHARLES H. PALMER,
Trustee.
By HENRY A. ROOT,
His Attorney.
ANDREW J. DAVIS,
Trustee.
ELIZABETH A. SMITH.
By J. HOWARD SMITH and
THOMPSON CAMPBELL,
Her Attorneys.

HARRIET WOOD,
ELIZABETH S. BOWDOIN and
JOHN A. BOWDOIN and
CALVIN P. DAVIS.
By C. P. DRENNEN and
C. M. DEMOND,
Their Attorneys.

The State of Montana, }
County of Silver Bow. } ss.

Henry A. Root makes oath and says that he is one of the petitioners herein for a partial distribution, and for an order for delivery of real estate, of the estate of Andrew J. Davis, deceased; that he has read the foregoing petition and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge, except as to those matters therein stated on information and belief, and that as to those he believes it to be true.

HENRY A. ROOT.

Subscribed and sworn to before me this sixth day of December, A. D. 1897.

JOHN BEAN,
Notary Public in and for Silver Bow County, Montana.

Filed Dec. 18th, 1897.

Complainant's Exhibit, "Answer of Administrator to Petition."

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of
ANDREW J. DAVIS, Deceased.

Now comes John H. Leyson, administrator of the estate of Andrew J. Davis, deceased, with the will annexed and answering to the petition of Sarah M. Cummings, et al, for a partial distribution of the real estate of the said estate and for the delivery of real estate to the parties entitled thereto, admits:

That each and all of the allegations contained in said petition are true.

This administrator further answering states the condition of the said estate, now in his hands to be as follows, to wit:

There is cash on hand, $306,290.05.

There is due upon the former distribution and undelivered to Mary L. Dunbar and Elizabeth Ladd, $64,285.72, leaving a balance in the hands of the administrator unappropriated of $242,004.33.

The administrator further says, that all city and county taxes and all other expenses have been paid up to the present time, except that there is now due and unpaid upon the assessment upon the stock of the First National Bank of Helena, Montana, the sum of $86,880 and the costs of administration, consisting of clerks', attorneys'

and administrators' fees and that there is also due the inheritance tax upon the said estate, the exact amount of which has not been ascertained or determined; and there will also be due the sum of twenty-five dollars per month, clerical work, and probably other small current expenses, but that there is now cash on hand over and above the liabilities and which this administrator states will be more than sufficient to meet all obligations which can be enforced against the said estate.

The administrator makes this statement for the enlightenment of the Court, and he does not urge any objection whatever, to the partial distribution and delivery of the real estate of the estate as prayed for in said petition, but respectfully submits the same for such action therein as the Court may deem it proper to take.

JOHN H. LEYSON,

Administrator of the Estate of Andrew J. Davis, Deceased, with the will annexed.

No. 285. In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow. In the Matter of the Estate of Andrew J. Davis, deceased. Administrator's answer to petition for distribution, etc. Filed Dec. 16, 1897. Clinton C. Clark, Clerk. By R. E. Leonard, Deputy Clerk.

Complainant's Exhibit, "Decree of Partial Distribution and Order for Delivery of Real Estate."

In the District Court of the Second Judicial District, of the State of Montana, in and for the County of Silver Bow.

In the Matter of the Estate of
ANDREW J. DAVIS, Deceased.

Be it remembered, that on this 18th day of December, 1897, the joint and several petition of Sarah M. Cummings, Harriet Wood, Elizabeth S. Bowdoin and John A. Bowdoin, her husband, Calvin P. Davis, Ellen S. Cornue and Joshua G. Cornue, her husband, Henry A. Root and Rosine B. Root, his wife, Elizabeth A. Smith and J. Howard Smith, her husband, being heirs and next of kin of Andrew J. Davis, deceased, and who are interested in his estate, and Andrew J. Davis Jr. and Charles H. Palmer, trustees under the compromise agreement, dated April 28, 1893, heretofore approved by this Court, for an order and decree that the administrator of said estate deliver to the persons entitled thereto, all and singular the real estate, belonging to said estate and for a partial distribution of said estate, coming on to be heard pursuant to the order of this Court duly made and filed on the 10th day of December, 1897, fixing the 16th day of December, 1897, for the hearing thereof, and said hearing having been by the Court duly continued until this day, and pursuant to notice thereof pursuant to said order, proof of the due posting of said notices and the personal service thereof

on John H. Leyson, administrator, with the will annexed of Andrew J. Davis, deceased, as required by law and the previous order of this Court, being made to the satisfaction of that Court, and upon reading and filing the petition of John E. Davis, administrator of the estate of John A. Davis, deceased, joining in said petition, and the petition of Harriet R. Sheffield and Henry A. Davis joining in the said petition, and the answer of said John H. Leyson, administrator, with the will annexed of Andrew J. Davis, deceased, and upon due proof submitted to the Court, in support of said petition, and upon due consideration, and it appearing that all of the said petitioners, and the said John H. Leyson, as such administrator, have appeared by their respective attorneys, or otherwise, and have consented to the distribution hereinafter decreed; and it further appearing that due and proper no tice to the creditors of said estate has been made regularly given in pursuance of the statutes in such case made and provided, and that more than twelve months have elapsed since the appointment of said administrator, and that more than ten months have elapsed since the first publication of notice to the creditors of said estate, and that no claims have been proven up and allowed against said estate which have not been fully paid; that all taxes which have attached to or accrued against the said estate have been fully paid; that the decedent Andrew J. Davis died seised and possessed of a large amount of real estate situated in the State of Montana, of which the said administrator had been heretofore entitled to the possession; and that the rents, issues, and profits of the real estate of said estate are not necessary to be received

by the said administrator wherewith to pay any debts of the decedent, and that it will not be necessary to sell said real estate for the payment of such debts, and that no injury or damage whatever can accrue by the partial distribution of said estate and the delivery of the possession of all of said real estate of said Andrew J. Davis, deceased, to the persons entitled thereto as required by your petitioners.

And it further appearing that John H. Leyson as such administrator, has now on hand in cash the sum of two hundred and thirty-eight thousand and seventy-five and 59-100 ($238,075.59) dollars, besides a large amount of other property as shown by the inventory filed herein, and that the petitioners request now the distribution and delivery of possession to the parties entitled thereto, of all and singular the real estate belonging to the said estate or in which the said estate may have any interest, in the State of Montana, and that the same can safely be now ordered to be distributed and delivered as prayed for, without damage or injury to said estate or any person interested therein.

And it further appearing that the legacies in said will contained to Thomas Jefferson Davis, Pet Davis, and Miss Berget, and each of them have been fully paid by said administrator and that the rights and interests of the said parties and of the said petitioners in the estate of the said Andrew J. Davis, deceased, are as follows, to wit: Subject to the expenses of administration of the estate of Andrew J. Davis, deceased; the said John E. Davis as administrator of the estate of John A. Davis, deceased is entitled to have and receive two hundred eleven

hundredths (200-1100) of said estate in kind; the said Henry A. Root, Sarah Maria Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue are entitled to have and receive two hundred and fifty eleven hundredths (250-1100) of said estate in kind; the said Harriet R. Sheffield, and Henry A. Davis are entitled to have and recieve forty-four eleven-hundredths (44-1100) of said estate in kind; the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood are each entitled severally to have and receive fifty eleven-hundredths (50-1100) of said estate in kind; and the said Elizabeth A. Smith is entitled to have and receive twenty-five eleven-hundredths (25-1100) of said estate in kind; but that no portion of the real estate owned by the said Andrew J. Davis, deceased, and situated in the State of Iowa, is to comprise any portion of the said estate in estimating and ascertaining the amount to which the said Elizabeth S. Bowdoin, Calvin P. Davis, Harriet Wood, and Elizabeth A. Smith are entitled; nor are they to be charged with any part of the bequest given to the said Thomas Jefferson Davis in said will, but that the same shall be settled as to them as if no bequest had been made:

And it further appearing that finally Andrew J. Davis, Jr., and Charles H. Palmer, trustees, appointed by the compromise agreement of certain heirs of the said Andrew J. Davis, deceased, dated April 28th, 1893, are entitled to have and receive four hundred and thirty-one eleven-hundredths (431-1100) of said estate in kind, to be held and disposed of by them pursuant to the provisions of said trust:

No. 624

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HARRIET S. HOLTON, as Executrix of Harriet Wood, Deceased,
Appellant,

vs.

ANDREW J. DAVIS, JR., THE FIRST NATIONAL BANK OF BUTTE, MONTANA, et al.,
Appellees.

TRANSCRIPT OF RECORD.

Vol. IV

(Pages 961 to 1264 Inclusive)

Appeal from the Circuit Court of the United States for the District of Montana.

FILMER-ROLLINS CO. PRINT, 424 SANSOME ST., S. F.

FILED
SEP 3 - 1900

It is now hereby ordered, adjudged, and decreed that the rights and the interests of the respective parties are as hereinbefore set forth:

It is further ordered, adjudged, and decreed that the prayers of said petitions be and the same are hereby granted, and that John H. Leyson, as administrator of the estate of Andrew J. Davis, deceased, be and he is hereby ordered and directed forthwith to distribute and deliver possession of all and singular the real estate belonging to the said estate of Andrew J. Davis, deceased, or in which the said estate may have any interest, situated in the State of Montana, to the following persons or their agents or legal representatives; and that such persons do have and hold their respective shares, parts, and portions thereof; and that such shares, parts and portions be and the same are hereby distributed to them, as owners or tenants in common, in the following proportion, to wit:

To the said Andrew J. Davis, Jr., and Charles H. Palmer, the said trustees, four hundred and thirty-one eleven-hundredths (431-1100) of asid real estate; to be held and disposed of by them pursuant to the provision of said trust.

To the said Henry A. Root, Sarah M. Cummings, Mary L. Dunbar, Elizabeth S. Ladd, Charles H. Ladd, Ellen S. Cornue and Joshua G. Cornue two hundred and fifty eleven-hundredths (250-1100) of said real estate.

To the said John E. Davis as administrator of the estate of John A. Davis, deceased, two hundred eleven-hundredths (200-1100).

To the said Elizabeth S. Bowdoin, fifty eleven-hundredths (50-1100).

To the said Calvin P. Davis, fifty eleven-hundredths (50-1100).

To the said Harriet Wood fifty eleven-hundredths (50-1100).

To the said Elizabeth A. Smith twenty-five eleven-hundredths (25-1100).

To the said Harriet R. Sheffield and Henry A. Davis, forty-four eleven-hundredths (44-1100).

Dated at Butte City, Montana, February 8th, 1898.

JOHN LINDSAY,

Judge Second Judicial District Court, State of Montana, Silver Bow ounty.

[Endorsed]: 285. In the Second Judicial District Court, Silver Bow County, Montana. In the Matter of the Estate of Andrew J. Davis, Deceased. Decree of Partial Distribution. Pro. Misc. F. 407. Filed Feb. 8, 1898. Clinton C. Clark, Clerk. By R. E. Leonard, Deputy Clerk.

Complainant's Exhibit, "Certificate of Clerk to Decree of Partial Distribution."

Office Clerk District Court.

State of Montana, }
County of Silver Bow. } ss.

I, Clinton C. Clark, clerk of the District Court of the Second Judicial Distrct of the State of Montana, in and for the County of Silver Bow, hereby certify that the foregoing is a full, true and correct transcript of the following filed and records of my office, to wit: Will; certifi-

cate of facts found on probate thereof; order probating will and fixing shares, in the matter of the estate of Andrew J. Davis, deceased; petition of John E. Davis, administrator of the estate of John A. Davis, deceased, to settle interests of said estate in estate of Andrew J. Davis, deceased, and order on said petition, in the matter of the estate of John A. Davis, deceased; joint petition to fix shares and dismiss contests; order of court thereon; petition for partial distribution; petition of John E. Davis for partial distribution; answer of J. H. Leyson, administrator, to said petitions; decree of partial distribution; joint petition to distribute real estate; petition of Harriet R. Sheffield and Henry A. Davis for distribution of real estate; petition of John E. Davis as administrator, for distribution of real estate; answer of John H. Leyson, administrator, to said petition, and decree of partial distribution and order for delivery of real estate, in the matter of the estate of Andrew J. Davis, deceased, as the same appear of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 18th day of June, A. D. 1898.

[Seal] CLINTON C. CLARK,

Clerk.

Complainant's Exhibit, "Exemplification of Record."

UNITED STATES OF AMERICA.

State of Montana, }
County of Silver Bow. } ss.

I, John Lindsay, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, which is a court of record, having a seal, hereby certify that Clinton C. Clark, whose genuine original signature is subscribed to the annexed certificate and attestation, is and was at the time of making the said certificate and attestation, the clerk of said District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, duly elected, qualified, and acting as such clerk; that full faith and credit are due to his official acts, and that he is the legal keeper of all the records and seal of said court; that said certificate and attestation are in due form of law; and the seal affixed thereto is the genuine seal of said court.

Witness my hand at Butte City, Montana, this 18th day of June, A. D. 1898.

JOHN LINDSAY,

Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

State of Montana, }
County of Silver Bow. } ss.

I, Clinton C. Clark, clerk of the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, which is a court of record, having a seal, do hereby certify that the Honorable John Lindsay, whose name is subscribed to the annexed and foregoing certificate, is and was, at the time of making such certificate, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, duly elected, sworn, qualified, and acting as such Judge, to all whose acts as such, full faith and credit are due, and that the signature of said Judge to said certificate is genuine.

Witness my hand and the seal of the District Court of the Second Judicial District of the State of Montana, in and for the county of Silver Bow, at my office in Butte City, Montana, this 18th day of June, A. D. 1898.

CLINTON C. CLARK,

Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

Complainant's Exhibit, "Wood, Power of Attorney."

(June 21, 1898. Charles W. Blair, Special Examiner.)

HARRIET WOOD
vs.
A. J. DAVIS et al. } No. 58.

Know all men by these presents, that I, Harriet Wood, of the city of Springfield, in the commonwealth of Massachusetts, have made, constituted, and appointed, and by these presents do make, constitute, and appoint Walter S. Logan, Charles M. Demond and Marx E. Harby, of the city of New York, composing the firm of Logan, Demond & Harby, doing business as attorneys and counselors at law at 58 William street, in the city of New York, or any or all of the said members of the said firm, my true and lawful attorneys for me and in my name, place and stead, to compromise, settle, and adjust upon such terms as they may think fit and proper, any and all suits, controversies and actions, whether in law or in equity in the courts of Montana or elsewhere, that I, as a party, have or may have with or against any and every person claiming any right or interest in or to the estate of Andrew J. Davis, deceased, late of the city of Butte, Montana, either as heir at law, legatee, or distributee under any will, or alleged will, of said Andrew J. Davis, deceased, or otherwise, and to receive any estate, real or personal, moneys or properties of any kind whatsoever, or distributive share thereof belonging to me, or of which I may become pos-

sessed by virtue of any such compromise, settlement, or adjustment; and upon receiving the same, to give proper receipts, vouchers, discharges, or releases therefor.

Also to sell and convey any and all real and personal estate or my interest therein of which said Andrew J. Davis died seised and possessed, or any part thereof, for such price or sum of money and to such person or persons as they or any of them shall think fit and proper, and also for me and in my name and as my act and deed, to sign, seal, execute, and deliver such deeds and conveyances for the sale and disposal thereof, or any part thereof, with such clauses, covenants and agreements to be therein contained as my said attorneys or any of them shall think fit and expedient, hereby giving and granting to my said attorneys and to every of them by these presents full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, with full power of substitution; I hereby ratifying and confirming all that my said attorneys or any of them shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal this 16th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

HARRIET WOOD. [L. S.]

Signed, sealed and delivered in the presence of:

F. E. CARPENTER.
HARRIET S. HALTON.

City of Springfield,
County of Hampden,
Commonwealth of Massachusetts. } ss.

On this 16th day of June, in the year 1897, before me, Frank E. Carpenter, a notary public within and for the said county of Hampden, in the commonwealth of Massachusetts, duly authorized to take acknowledgments of deeds, personally appeared Harriet Wood, to me known and known to me to be the person whose name is subscribed to the within instrument, and she acknowledged to me that she executed the same.

In witness whereof, I have hereunto set my hand and my official seal this 16th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

FRANK E. CARPENTER,
Notary Public, Hampden Co., Mass.

Commonwealth of Massachusetts,
Hampden. } ss.

I, Robert O. Morris, clerk of the Supreme Judicial Court, which is a court of record for the county and commonwealth aforesaid, do hereby certify that Frank E. Carpenter, Esquire, whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument, and therein written, was, at the time of the taking of such proof or acknowledgment, a notary public within and for said commonwealth of Massachusetts, duly authorized to take the same and the proof or acknowledgment of deeds; and that I am well acquainted with the handwriting of said notary, and verily believe

that the signature to the said certificate is genuine; and I certify that the said instrument is executed and acknowledged according to the laws of this State.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Springfield, this 16th day of June, A. D. 1897.

[Seal] ROBERT O. MORRIS,
Clerk.

Complainant's Exhibit, "Bowdoin, Power of Attorney."

(June 21, 1898. C. W. B. Spl. Examiner.)

HARRIET WOOD
vs. } No. 58.
A. J. DAVIS et al.

Know all men by these presents, that we, Elizabeth S. Bowdoin and John A. Bowdoin, her husband, both of the city of Springfield, in the commonwealth of Massachusetts, have made, constituted and appointed, and by these presents do make, constitute, and appoint Walter S. Logan, Charles M. Demond, and Marx E. Harby, of the city of New York, composing the firm of Logan, Demond & Harby, doing business as attorneys and counselors at law at 58 William street, in the city of New York, or any or all of said members of the said firm, our true and lawful attorneys for us and each of us and in our names, place, and stead, and in the name, place, and stead of each of us, to compromise, settle, and adjust, upon such terms as to them or any of them may seem fit and proper, any and all suits, controversies, and actions, whether in law or in

equity, in the courts of Montana or elsewhere, that we, as parties, or either of us as a party, have or may have with or against any and every person claiming any right or interest in or to the estate of Andrew J. Davis, deceased, late of the city of Butte, Montana, either as heir at law or heirs at law, legatee or legatees, or distributee or distributees, under any will or alleged will of said Andrew J. Davis, deceased, or otherwise, and to receive any estate,real or personal, moneys or properties, of any kind whatsoever, or distributive share thereof, belonging to us or to either of us, or of which we or either of us may become possessed by virtue of any such compromise, settlement or adjustment; and upon receiving the same to give proper receipts, vouchers, discharges or releases therefor.

Also to sell and convey any and all real and personal estate or our interest or the interest of either one of us therein, of which said Andrew J. Davis died seised and possessed, or any part thereof, for such price or sum of money and to such person or persons as they or any of them shall think fit and proper, and also for us and in our names, and also for either of us and in the name of either of us, and as our act and deed and as the act and deed of either of us to sign, seal, execute, and deliver such deeds and conveyances for the sale and disposal thereof or any part thereof, with such clauses, covenants, agreements, and conditions to be therein contained as our said attorneys or any of them shall think fit and expedient, hereby giving and granting to our said attorneys and to every of them by these presents full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and

about the premises as fully to all intents and purposes as we or either of us might or could do if personally present with full power of substitution; and we and each of us hereby ratify and confirm all that our said attorneys and or any of them shall lawfully do or cause to be done by virtue hereof.

In witness whereof, we have hereunto set our hands and seals this 16th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

ELIZABETH S. BOWDOIN. [Seal]
JOHN A. BOWDOIN. [Seal]

Signed, sealed and delivered in the presence of:

LIZZIE A. BOWDOIN,
F. E. CARPENTER,

Witness as to Elizabeth S. Bowdoin.

LIZZIE A. BOWDOIN,
F. E. CARPENTER,

Witness as to John A. Bowdoin.

"And or any of them" inserted in the twentieth line before the last two words on this page.

City of Springfield,
County of Hampden, } ss.
Commonwealth of Massachusetts,

On this 16th day of June, in the year 1897, before me Frank E. Carpenter, a notary public within and for the said county of Hampden, in the commonwealth of Massachusetts, duly authorized to take acknowledgments of deeds, personally appeared Elizabeth S. Bowdoin and John A. Bowdoin, her husband, both of whom are known to me to be the persons whose names are subscribed to

the within instrument and they jointly and severally acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and my official seal this 16th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal] FRANK E. CARPENTER,
Notary Public, Hampden Co., Mass.

Commonwealth of Massachusetts, }
Hampden. } ss.

I, Robert O. Morris, clerk of the Supreme Judicial Court, which is a court of record for the county and commonwealth aforesaid, do hereby certify that Frank E. Carpenter, Esquire, whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument, and therein written, was, at the time of the taking of such proof or acknowledgment, a notary public within and for said commonwealth of Massachusetts, duly authorized to take the same and the proof or acknowledgment of deeds; and that I am well acquainted with the handwriting of said notary, and verily believe that the signature to the said certificate is genuine; and I certify that the said instrument is executed and acknowledged according to the laws of this State.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Springfield, this 16th day of June, A. D. 1897.

[Seal] ROBERT O. MORRIS,
Clerk.

Complainant's Exhibit, "Calvin P. Davis, Power of Attorney."

(June 21, 1898. C. W. B., Special Examiner.)

HARRIET WOOD
vs.   No. 58.
A. J. DAVIS et al.

Know all men by these presents, that I, Calvin P. Davis, of Peachland, in the county of Sonoma, and State of California, have made, constituted and appointed, and by these presents do make, constitute and appoint Charles M. Demond, of the city, county and State of New York, my true and lawful attorney for me and in my name, place, and stead and for my use and benefit, to ask, demand, sue for, recover, collect, and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities, lands, tenements and hereditaments and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to me from the estate of Andrew J. Davis, deceased, late of Butte, Montana, or from the estate of John A. Davis, deceased, late of Butte, Montana, or from the heirs, next of kin, legatees or devisees of said decedents, or either of them, or from any other person interested in said estates, and to have, use and take all lawful ways and means in my name or otherwise for the recovery thereof by suits, attachments or otherwise, and to compromise and agree for the same, and give deeds, acquittances or other sufficient discharges for the

same; and for me and in my name to receive and receipt for my distributive share of said estates, or either of them, and to commence and prosecute in my name any suits, actions or proceedings in the matter of said estates or in relation to any interests or property therein, and to settle, compromise and withdraw the same, or any suits, actions, or contests now pending therein, upon such terms and conditions as he shall think fit; and for me and in my name to make, sign, seal and deliver all deeds, contracts, stipulations, and agreements and other instruments which my said attorney shall deem proper, in relation to the said estates or my interests therein, or any interests therein which may be obtained for me by such compromise or otherwise; and to bargain, sell, convey, take, or receive, or purchase, mortgage, or pledge any lands, tenements, or hereditaments, or any interests therein which I now have or may acquire by reason of my interest in said estates, or by reason of any settlement my attorney may make of my interests therein, on such terms and conditions as he may deem necessary or proper to effect any settlement in relation to my said suits or interests, and generally to do and perform all and every act or thing whatsoever which my said attorney shall deem necessary or proper in relation to any interest I may have or obtain in said estates, or the collection of the same, or the litigation connected therewith.

Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might do if personally present, with full power

of substitution or revocation of such substitution, hereby ratifying and confirming all that my said attorney or his substitute or substitutes shall lawfully do or cause to be done by virtue of these presents.

In witness whereof, I have hereunto set my hand and seal this 8th day of June, A. D. 1897.

CALVIN P. DAVIS. [Seal]

Witness:

GEO. P. BAXTER.

J. A. WILLIAMS.

State of California,
County of Sonoma. } ss.

On this 8th day of June, in the year eighteen hundred and ninety-seven, before me, Geo. P. Baxter, a notary public within and for said county of Sonoma, personally appeared Calvin P. Davis, known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to be that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first written.

[Seal] GEO. P. BAXTER,

Notary Public in and for Sonoma County, State of California.

State of California
County of Sonoma. } ss.

I, Somers B. Fulton, county clerk of the county of Sonoma, State of California, and ex-officio clerk of the Su-

perior Court, in and for said county (which court is a court of record, having a seal), do hereby certify that Geo. P. Baxter, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument and therein written, was, at the time of taking such proof or acknowledgment, a notary public in and for said county, duly commissioned and qualified and duly authorized by law to take the same, and full faith and credit are due to all his official acts as such notary. And I do further certify that I am well acquainted with the handwriting of the said notary and verily believe that the signature to said certificate or proof of acknowledgment is genuine, and that the said instrument is executed and acknowledged according to the laws of this State.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Superior Court at my office in the city of Santa Rosa, this eighth day of June, A. D. 1897.

[Seal] SOMERS B. FULTON,
County Clerk and ex-officio Clerk of the Superior Court of the County of Sonoma, State of California.
By F. G. Nagle,
Deputy Clerk.

No. 1. Peachland, California, June 8th, 1897.

Know all men by these presents, that I, Henry C. Davis, of Peachland, Sonoma county, California, son of Calvin P. Davis, do hereby join in the annexed power of attorney signed by my father, Calvin P. Davis, and do confer upon the said Charles M. Demond therein mentioned all the power and authority therein mentioned with respect to any interest I now possess, or may hereafter possess or ac-

quire, in and to the property therein mentioned, the said power of attorney so signed by my said father and to which I have referred is dated June 8th, 1897.

In witness whereof, I have hereunto set my hand and seal, the day and year first above written.

HENRY C. DAVIS. [Seal]

Witness:

J. A. WILLIAMS.

GEO. P. BAXTER.

No. 2. Peachland, California, June 8th, 1897.

Know all men by these presents, that we, Ina A. Cochran, daughter of Calvin P. Davis, and residing in Peachland, Sonoma Co., California, and Arthur F. Cochran, her husband, residing as aforesaid, do hereby join in the annexed power of attorney signed by Calvin P. Davis, and do confer upon the said Charles M. Demond therein mentioned all the power and authority therein mentioned with respect to any interest we now possess or may hereafter possess or acquire in and to the property therein mentioned. The said power of attorney so signed by said Calvin P. Davis, and to which we have referred, is dated June 8th, 1897.

In witness whereof, we have hereunto set our hands and seals the day and year first above written.

INA A. COCHRAN. [L. S.]

A. F. COCHRAN. [L. S.]

Witness:

J. A. WILLIAMS.

GEO. P. BAXTER.

State of California, }
County of Sonoma. } ss.

On this 8th day of June, in the year eighteen hundred and ninety-seven, before me, Geo. P. Baxter, a notary public within and for said county of Sonoma, personally appeared Henry C. Davis and Ina A. Cochran and Arthur F. Cochran, her husband, severally known to me to be the persons whose names are subscribed to the within and foregoing instruments numbered 1 and 2 respectively and severally acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first written.

[Seal] GEO. P. BAXTER,

Notary Public in and for Sonoma County, State of Calinia.

State of California, }
County of Sonoma. } ss.

I, Somers B. Fulton, county clerk of the county of Sonoma, State of California, and ex-officio clerk of the Superior Court in and for said county (which court is a court of record, having a seal), do hereby certify, that Geo. P. Baxter, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument and therein written was, at the time of taking such proof or acknowledgment, a notary public in and for said county, duly commissioned and qualified and duly authorized by law to take the same, and full faith and credit

are due to all his official acts as such notary. And I do further certify that I am well acquainted with the handwriting of the said notary and verily believe that the signature to said certificate or proof of acknowledgment is genuine, and that the said instrument is executed and acknowledged according to the laws of this State.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Superior Court at my office in the city of Santa Rosa, this eighth day of June, A. D. 1897.

[Seal] SOMERS B. FULTON,

County Clerk and ex-officio Clerk of the Superior Court of the County of Sonoma, State of California.

By F. G. Nagle,

Deputy Clerk.

Complainant's Exhibit, "Contract of Settlement."

This indenture, made this twenty-second day of June, A. D. 1897, by and between Andrew J. Davis, of Butte, Montana, Edward A. Davis, of Chicago, Illinois, by Andrew J. Davis, his attorney in fact, so constituted by instrument dated the twenty-eighth day of April, 1893, John E. Davis, of Butte, Montana, Charles G. Davis, of Chicago, Illinois, George W. Davis, bachelor, and Morris A. Davis, bachelor, both of , sons and heirs of the said John A. Davis, deceased, and Thea. Jane Davis, of , widow of John A. Davis, deceased, parties of the first part, and Helen M. Davis, wife of Andrew J. Davis, Tenie B. Davis, wife of John E. Davis, both of Butte, Montana, and Gertrude F. Davis, wife of Charles G. Davis, and Mary A. Davis, wife of Edward A.

Davis, both of Chicago, Illinois, parties of the second part; and Henry A. Root, of Butte, Montana, Ellen S. Cornue, of Croton Falls, New York, Sarah Maria Cummings, of Ware, Massachusetts, Elizabeth S. Ladd, of Springfield, Massachusetts; Mary Louise Dunbar of Springfield, Massachusetts; all heirs at law of Andrew J. Davis, deceased, parties of the third part; and Rosine B. Root, wife of Henry A. Root, and Joshua G. Cornue, husband of Ellen S. Cornue, and Charles H. Ladd, husband of Elizabeth S. Ladd, parties of the fourth part; and John E. Davis, as administrator of the estate of John A. Davis, deceased, party of the fifth part; and Elizabeth S. Bowdoin, and John A. Bowdoin, her husband, of Springfield, Massachusetts, by Charles M. Demond, of the firm of Logan, Demond & Harby, her attorney in fact, so constituted by instrument dated the sixteenth day of June, 1897, and Harriet Wood, of Springfield, Massachusetts, by Charles M. Demond, of the firm of Logan, Demond & Harby, her attorney in fact, so constituted by instrument dated June sixteenth, 1897, and Calvin P. Davis, of Peachland, Sonoma County, California, by Charles M. Demond, his attorney in fact, so constituted by instrument dated June 8, 1897, parties of the sixth part, witnesseth:

I. Whereas, Andrew J. Davis, of the city of Butte, Montana, died at the city of Butte, where he resided, on March 11, 1890, leaving a large estate, real, personal, and mixed, situated in the State of Montana and elsewhere; and,

II. The said Andrew J. Davis left him surviving as his only heirs at law and next of kin the following per-

sons, entitled, in case of his intestacy, to the following shares of the said estate, and being of the following relationship to him, viz:

(a) The said Diana Davis, a sister, one-eleventh;

(b) The said Sarah M. Cummings, a sister, one-eleventh;

(c) The said Harriet Wood, a sister, one-eleventh;

(d) The said Elizabeth S. Bowdoin, a sister, one-eleventh;

(e) The said Calvin P. Davis, a brother, one-eleventh;

(f) The said John A. Davis, a brother, now deceased, one-eleventh;

(g) Erwin Davis, of New York City, a brother, one-eleventh;

(h) The said Henry A. Root and Ellen S. Cornue, children of Anna C. Root, deceased, a sister, one twenty-second each;

(i) Elizabeth A. Smith, of Temescal, Contra Costa county, California, and the said Mary Louise Dunbar, children of Roxanna Dunbar, deceased, a sister, one twenty-second each.

(j) Harriet R. Sheffield, of Northport, New York, and Henry A. Davis, of Monson, Massachusetts, children of Asa L. Davis, deceased, a brother, one twenty-second each;

(k) The said Elizabeth S. Ladd, child of Sophronia Firman, deceased, a sister, one-eleventh; and,

III. Whereas, a paper purporting to be the last will and testament of Andrew J. Davis, deceased, dated July 20, 1866, was propounded for probate by the said John A. Davis in July, 1890, in the District Court of the Sec-

ond Judicial District of the State of Montana, in and for the County of Silver Bow, which said will gave, devised and bequeathed to the said John A. Davis all of the property of Andrew J. Davis, deceased, except a life maintenance therein given to Thomas Jefferson Davis, Pet Davis and Miss Bergett; and,

IV. Whereas, the probate of said will was contested in said court by the said Henry A. Root and Sarah Maria Cummings jointly, and also by the said Harriet R. Sheffield and Henry A. Davis, jointly; and,

V. Whereas, pending said contests, and on or about January 24, 1893, the said John A. Davis died intestate, leaving him surviving the parties of the first part, his sons and widow, as his only heirs at law and next of kin, and on March 11, 1893, the said John E. Davis was, by said court, duly appointed his administrator, and on or about April 1, 1893, the said John E. Davis, as such administrator, was substituted as proponent of said will in the place of his said father, John A. Davis, by order of said Court; and said probate proceedings, so begun by the said John A. Davis, were, by order of said Court, revived; and,

VI. Whereas, on or about March 27, 1895, the said contests, so instituted as aforesaid, against the probate of the said will, were compromised in said court, and the said will was, by order of said Court on said day, admitted to probate, and by certain contracts, stipulations, conveyances and agreements, made pursuant to the said compromise, among others, dated the 28th day of April, 1893, and the 25th day of March, 1895, it was agreed and contracted that the following persons should have and

be entitled to the following shares of said estate of Andrew J. Davis, deceased, in kind: Forty-four eleven-hundredths (44-1100) to the said Harriet R. Sheffield and Henry A. Davis; that is to say, twenty-two eleven-hundredths (22-1100) thereof to each of them (and subject to the bequests in said will to Thomas Jefferson Davis, Pet Davis and Miss Bergett); four hundred and fifty-six eleven-hundredths (456-1100) thereof to the said parties of the first part; and six hundred eleven-hundredths (600-1100) thereof to the parties of the third and fourth parts, with the exception of Rosine B. Root, wife of Henry A. Root; and, pursuant to the said contracts, stipulations, agreements and conveyances, a decree of the said Court was, on said March 27, 1895, entered according; and,

VII. Whereas, the parties of the first, third and fifth parts have acquired and purchased all the interests of the said Diana Davis in and to the said estate of the said Andrew J. Davis, deceased, as heirs at law or next of kin of the said Andrew J. Davis, deceased, or otherwise, and are now the owners thereof; and the parties of the first, third and fifth parts have acquired and purchased all the interests of the said Harriet R. Sheffield and Henry A. Davis in and to the said estate of the said Andrew J. Davis, deceased, as heirs at law or next of kin, or otherwise, over and above the said forty-four eleven-hundredths (44-1100) of the said estate, so transferred and conveyed to them as aforesaid, and are now vested therewith and the owners thereof; and,

VIII. Whereas, the said Elizabeth S. Bowdoin and Calvin P. Davis, after the probate of said will, did duly, within the time prescribed by law, institute in said

court separate contests, by petition, to revoke the probate of the said will, which contests are now at issue and are now pending, and the said Harriet Wood is interested with them in the said prosecution thereof, and is represented by the same attorney; and,

IX. Whereas, it is proposed and contemplated by the parties hereto to settle, adjust and compromise said contests of the said Elizabeth S. Bowdoin and Calvin P. Davis, and the claims and rights of the said Harriet Wood, and to fix and adjust the status and shares of the parties hereto in and to the said estate of Andrew J. Davis, deceased;

Now, therefore, in consideration of the premises, and of the sum of one dollar, paid by each party hereto to the other, and in consideration of other valuable considerations, the receipt of all of which by each party from the other is hereby acknowledged, and in consideration of the compromise and settlement of the said contests of the said Elizabeth S. Bowdoin and Calvin P. Davis, and of the rights and claims of the said Harriet Wood, and the dismissal of the said contests, it is hereby covenanted, agreed, stipulated and granted, as follows:

First. The parties of the first, second, third and fourth parts, and each of them, do hereby sell, assign, set over and transfer, and do hereby grant, bargain, sell, convey and confirm unto the said Elizabeth S. Bowdoin and the said Calvin P. Davis and the said Harriet Wood, their respective heirs, executors, administrators and assigns, forever, one undivided twenty-second (1-22) interest or part, in kind, to each of them respectively, in and to all of the property and estate of the said Andrew J. Davis,

deceased, real, personal and mixed, wherever situated, with which said parties are now vested or to which they are in any way entitled, or with which they or either of them may hereafter be vested or entitled, as heirs, next of kin, legatees or devisees of the said Andrew J. Davis, deceased, or by virtue of any contract in relation to the said estate; except such real estate as is situated in the State of Iowa and which the parties of the first and third parts, or their representatives, have heretofore agreed to convey to the said Thomas Jefferson Davis, which said real estate in Iowa is excepted from the terms of this indenture; and in and to the said estate of Andrew J. Davis, deceased, as it now exists, and in and to any property thereof which the said estate may hereafter acquire, the said estate and property, however, to be subject to the payment of maintenance given in said will to Pet Davis and Miss Bergett, and to the payment of all debts against said estate, and costs and charges of administration in Montana and elsewhere.

And with respect to all lands hereby transferred and conveyed, the said parties do hereby also grant, bargain, sell and convey, excepting as hereinbefore set forth, all and singular, the one undivided twenty-second (1-22) interest or part to each of the said Elizabeth S. Bowdoin, Harriet Wood and Calvin P. Davis, in and to all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all veins, leads or lodes therein or thereto belonging, together with all the dips, spurs and angles, and also all the metals, ores, gold

and silver-bearing quartz, rock and earth, and all other metals and minerals therein, and all the rights, privileges and franchises thereto incident, attendant and appurtenant, or therewith usually had and enjoyed.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said Elizabeth S. Bowdoin, the said Harriet Wood and the said Calvin P. Davis, and each of them, their respective heirs and assigns, forever, one undivided twenty-second (1-22) part of all of the same to each of them respectively, the said parties hereby transferring and granting in all (subject and excepting as aforesaid), three undivided twenty-seconds (3-22) of all the property hereinbefore set forth and specified, to each of the said Elizabeth S. Bowdoin, Harriet Wood and Calvin P. Davis, one undivided twenty-second (1-22) thereof, which undivided twenty-second part thereof is hereby transferred and granted to each severally, and which they respectively hold with the other parties as tenants in common, and not as joint tenants.

Second. The parties of the first, second, third, fourth and fifth parts, their respective heirs, executors, administrators and assigns, do hereby covenant and agree to and with the parties of the sixth part, their respective heirs, executors, administrators and assigns, that in case Elizabeth A. Smith, whose contest against the probate of the will of Andrew J. Davis, deceased, is now pending, shall in said contest or by any settlement or adjustment of the same, or otherwise, receive or be entitled to any portion of the said estate, that then and in that event no portion so coming to the said Elizabeth A. Smith shall be taken

from the shares herein transferred and granted to the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood, but that said shares shall be free and clear of all liability to pay or contribute to the payment of the same, or any part thereof; and do further covenant and agree that they will adjust and settle all claims of Thomas Jefferson Davis to all share in said estate, and that the shares herein granted and transferred to Elizabeth S. Bowdoin, Calvin P. Davis, and Harriet Wood shall be free and clear of all liability to pay or contribute to the payment, in whole or in part, of any claim or claims of the said Thomas Jefferson Davis, and do further agree that said shares so granted and transferred by this indenture to the said Elizabeth S. Bowdoin and Harriet Wood and Calvin P. Davis shall be free and clear of and from all costs, expenses, charges, counsel and attorney fee's of any parties of the first, second, third, fourth and fifth parts hereto, or any of them, expended, paid out, incurred or contracted in probating or opposing the probate of said will, or in any other matter or proceeding relating to said estate or the property thereof, or in respect to any litigation connected therewith, except expenses and costs of administration of the estate of Andrew J. Davis, deceased, and of litigation by the administrator of said estate, as such.

Third. It is mutually understood, covenanted and agreed by and between all the parties hereto, their respective heirs, executors, administrators and assigns, that the share or interest so as above transferred and granted to each of the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood, in and by this indenture, is a one un-

divided twenty-second (1-22) part or interest, in kind, to each of them, not only in and to all property of said estate of Andrew J. Davis, deceased, real, personal and mixed, and in and to all property, choses in action and other rights and interests now owned by said estate, real, personal and mixed, and wherever situated (subject and excepting as aforesaid), but also in and to all claims, suits, choses in action and rights of said estate, in law or equity, for the recovery of property of said estate, or otherwise (subject and excepting as aforesaid), which now exist or which hereafter may exist or accrue, and of which the said Andrew J. Davis, deceased, died seised or possessed, or in which he had any interest at the time of his death, or to which his estate since his death had, or has, or may acquire any right or interest and which may hereafter come into the ownership of the said estate by operation of law or otherwise; it being the intention of this indenture that this indenture and conveyance shall be binding and operative upon all interests and property which the said parties of the first, second, third, fourth and fifth parts (subject and excepting as aforesaid), now have as heirs at law or next of kin of the said Andrew J. Davis, deceased, in and to his estate, or under or by virtue of the provisions of any will of said Andrew J. Davis, deceased, which is now or may hereafter be admitted to probate, or which they or either of them have acquired or may acquire in any manner whatsoever, by assignment or transfer from any person claiming to be an heir of Andrew J. Davis, deceased, or otherwise, and whether such interest shall descend to them, or either of them, directly from Andrew J. Davis, deceased, or his

estate, or by virtue of his will or otherwise, or whether such interests shall descend to or be acquired by or distributed to them directly from John A. Davis, deceased, or his estate, or otherwise; and that it is further understood, covenanted and agreed by the parties of the first part herein, that in case any distribution of any of the property of the estate of Andrew J. Davis, deceased, shall be had through or in the estate of John A. Davis, deceased, to all or any of the parties hereto, that then and in that event the shares or interests herein conveyed, granted and transferred to the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood shall be free and clear of all claims of creditors of said John A. Davis, deceased, now filed in the matter of his said estate of which may hereafter be urged, prosecuted or filed, and free and clear from all costs of administration, attorney and counsel fees and all other charges and expenses in or against the said estate of John A. Davis, deceased; provided however, that in case Erwin Davis shall succeed in establishing any claim to and in recovering any part of the property of said estate in Massachusetts, so that the same shall not be obtained by or distributed to the parties of the first, third and fifth parts herein, by reason of the said claims of Erwin Davis, then said portion so obtained by the said Erwin Davis in Massachusetts shall not be considered as a part of the estate of Andrew J. Davis, deceased, conveyed or agreed to be conveyed by or under the terms of this indenture.

Fourth. In consideration of the premises, the said parties of the sixth part, to wit: Elizabeth S. Bowdoin and John A. Bowdoin, her husband; Calvin P. Davis and

Harriet Wood, for themselves, their heirs, executors, administrators and assigns, do hereby sell, assign, convey, transfer and grant, unto the said parties of the first and third parts, their heirs and assigns, forever, all the right, title, interest, claim and demand whatsoever, whether at law or in equity, and whether vested or contingent, of the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood, and all and each of them, of, in and to all and every portion of the said estate of Andrew J. Davis, deceased, and all property thereof, whether real, personal or mixed, and wherever situated, except three undivided twenty-seconds (3-22) interests or parts or shares thereof, in kind, transferred and conveyed to said Elizabeth S. Bowdoin, Harriet Wood and Calvin P. Davis by this instrument, as hereinbefore provided, and the said Elizabeth S. Bowdoin and the said Calvin P. Davis do hereby withdraw, and do hereby agree to withdraw and dismiss, in open court or otherwise, their said contests so filed against the probate of said will as aforesaid, each party to pay his own costs, and all moneys deposited as security for costs to be returned to said Elizabeth S. Bowdoin and Calvin P. Davis, or their attorneys.

Fifth. It is mutually understood, covenanted and agreed that all parties hereto shall, so far as in their power lies, aid in securing speedily both a partial and final distribution of the said estate or estates, according to the terms of this agreement, and without the giving of any bond, if practicable, and agree to endeavor to obtain an order of the Court accordingly; and it is further agreed that no party to this instrument shall oppose such distribution, partial or final, and that all parties hereto shall

assist, as far as in their power lies, in securing the property of said estate in Massachusetts to be forwarded by the administrators of the said estate in Massachusetts to the administrator of said estate in Silver Bow County, Montana to be then in said county distributed as speedily as possible.

Sixth. It is further mutually agreed that the decree or decrees to be entered and filed in said court, withdrawing said contests, shall fix and set forth the shares of the said estate as herein transferred and granted, to the said Elizabeth S. Bowdoin, Harriet Wood and Calvin P. Davis, and shall be based upon all the terms and conditions of this indenture; and it is further mutually agreed that the law firm of Logan, Demond & Harby, of New York, and C. P. Drennen, attorney at law in Butte, Montana, shall control and direct the distribution of the said shares so transferred and granted to the said Elizabeth S. Bowdoin, Calvin P. Davis and Harriet Wood, and that if said attorneys so elect, all sums of money and personal property to be distributed, on account of said shares, in accordance with the terms of this indenture, shall be distributed to said attorneys, or their heirs or assigns, or as they may direct.

Seventh. This indenture shall not affect the right of the said estate of Andrew J. Davis, deceased, or any party hereto, of instituting or conducting suits or litigations, either before or after distribution, to recover for said estate any property to which said estate, at the time of the death of the said Andrew J. Davis, or since then, or now, was, has been, is, or shall hereafter be entitled, which right is reserved and saved to any or all of the parties

hereto, if any now exists or may hereafter accrue; *provided*, however, and it is understood and agreed by and, between all the parties hereto, that nothing in this agreement contained, either by reason of the execution hereof by the said Andrew J. Davis, one of the parties of the first part herein, for himself or as attorney in fact for any other party hereto, or otherwise, shall be construed or held or taken in anywise to affect of change or enlarge or diminish or impair the respective rights or claims of the said estate of Andrew J. Davis, deceased, on the one part, or of the said Andrew J. Davis, one of the parties of the first part herein, on the other part, of, in or to certain shares of the capital stock of the First National Bank of Butte, Montana, claimed by the said Andrew J. Davis, one of the parties of the first part herein, under and by virtue of a gift thereof to him, as his individual property, by the said Andrew J. Davis, deceased, or in any litigation that may now be pending or may hereafter be instituted, relating in any way to the said shares of said stock, and no grant or conveyance herein, made on the part of or by the said Andrew J. Davis, one of the parties of the first part herein, to any of the parties to this agreement, shall be held or construed to give or grant to anyone any right or interest, or to waive any right the said Andrew J. Davis, one of the parties of the first part herein, has or claims, in or to said shares of said stock, or any of them, claimed by him as his individual property under the gift above mentioned, nor shall any of the covenants or provisions of this agreement on his part apply to or affect said shares of stock, unless said shares should finally be adjudged to be the property of the said estate of Andrew J. Davis, deceased.

Eighth. It is further understood and hereby stipulated as part of the consideration of this agreement that none of the parties hereto shall take or institute any action or proceeding to charge the administrator with the will annexed of the said estate of Andrew J. Davis, deceased, for or on account of any default of the said administrator, if any there be, heretofore made or occurring, for any failure of said administator to invest or derive interest from any of the funds of said estate,and no claim shall be made against such administrator by any of the parties hereto, for or on account of any such failure or default heretofore.

In witness whereof, the several parties to this indenture and agreement have hereunto set their hands, the day and year first hereinabove written.

ANDREW J. DAVIS,
EDWARD A. DAVIS,
By Andrew J. Davis,
His Attorney in Fact.
JOHN E. DAVIS.
JOHN E. DAVIS.

As Administrator of the Estate of John A. Davis, Deceased.

HELEN M. DAVIS.
TENIE B. DAVIS.
CHARLES G. DAVIS.
GERTRUDE F. DAVIS.
MORRIS A. DAVIS.
MARY A. DAVIS.
THEAH JANE DAVIS.
GEORGE W. DAVIS.

HENRY A. ROOT.
ROSINE B. ROOT.
ELLEN S. CORNUE.
JOSHUA G. CORNUE.
MARY LOUISE DUNBAR.
ELIZABETH S. LADD.
CHARLES H. LADD.
SARAH M. CUMMINGS.
ELIZABETH S. BOWDOIN,
By Charles M. Demond,
Her Attorney in Fact.
JOHN A. BOWDOIN,
By Charles M. Demond,
His Attorney in Fact.
HARRIET WOOD,
By Charles M. Demond,
Her Attorney in Fact.
CALVIN P. DAVIS,
By Charles M. Demond,
His Attorney in Fact.

Know all men by these presents, that we, Henry C. Davis, of Peachland, Sonoma county, California, son of Calvin P. Davis, Ina A. Cochran, of said Peachland in said county and State, daughter of the said Calvin P. Davis, and Arthur F. Cochran, her husband, by Charles M. Demond, their attorney in fact, so constituted by instrument dated the 8th day of June, 1897, do hereby ratify and approve the annexed indenture, dated the 22d day of June, 1897, to which the said Calvin P. Davis is a party, and do approve and confirm the same, and all the provi-

sions thereof, to the same extent as though we were original parties thereto.

In witness whereof, we have hereunto set our hands and seals by your said attorney this 25th day of June, 1897.

HENRY C. DAVIS.
INA A. COCHRAN.
ARTHUR F. COCHRAN,
All by Charles M. Demond,
Their Attorney in Fact.

Signed, sealed and delivered in presence of:

JOHN F. FORBIS.

State of Montana,
County of Silver Bow. } ss.

On this 25th day of June, in the year 1897, before me, L. Orvis Evans, a notary public in and for Silver Bow county, State of Montana, personally appeared Charles M. Demond, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Henry C. Davis, Ina A. Cochran and Arthur C. Cochran, and acknowledged to me that he subscribed the names of Henry C. Davis, Ina A. Cochran and Arthur C. Cochran thereto as principals and his own name as attorney in fact.

In testimony whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal] L. ORVIS EVANS,
Notary Public in and for Silver Bow County, Montana.

State of Montana, } ss.
County of Madison. }

On this 28th day of June, 1897, before me, Augustus Anderson, a notary public in and for the county of Madison, State of Montana, personally appeared Andrew J. Davis and Helen M. Davis, his wife, John E. Davis and Tenie B. Davis, his wife, all personally known to me to be the individuals described in and whose names are subscribed to the foregoing agreement, and who severally acknowledged to me, each for himself, and herself, that they executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] AUGUSTUS ANDERSON,
Notary Public in and for the County of Silver Bow, Montana.

State of Montana, } ss.
County of Silver Bow. }

On this 25th day of June, 1897, before me, L. Orvis Evans, a notary public in and for the county of Silver Bow, State of Montana, personally appeared Henry A. Root and Rosine B. Root, his wife, personally known to me to be the individuals described in and whose names are subscribed to the foregoing agreements, and who severally acknowledged to me, each for himself and herself, that they executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] L. ORVIS EVANS,

Notary Public in and for the County of Silver Bow, Montana.

State of Montana, }
County of Madison. } ss.

On this 28th day of June, 1897, before me, Augustus Anderson, a notary public in and for the county of Madison, State of Montana, personally appeared Andrew J. Davis, known to me to be the person whose name is subscribed to the within instrument as attorney in fact of Edward A. Davis, and acknowledged to me that he subscribed the name of Edward A. Davis thereto as principal and his own name as attorney in fact.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] AUGUSTUS ANDERSON,

Notary Public in and for the County of Madison, State of Montana.

State of Illinois, }
County of Cook. } ss.

On this 13th day of July, 1897, before me, Nellie M. Lewis Panushka, a notary public in and for the county of Cook, State of Illinois, personally appeared Charles G. Davis and Gertrude F. Davis, his wife, both personally known to me to be the individuals described in and whose

names are subscribed to the foregoing agreements, and who severally acknowledged to me, each for himself and herself, that they executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] NELLIE M. LEWIS PANUSHKA,
Notary Public in and for the County of Cook, State of Illinois.

State of Washington, }
County of Spokane. } ss.

On this 13th day of August, 1897, before me, Guss W. Roche, a notary public in and for the county of Spokane, State of Washington, personally appeared Thea Jane Davis, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] GUSS W. ROCHE,
Notary Public in and for the County of Spokane, State of Washington, Residing at Spokane.

State of Illinois, }
County of Cook. } ss.

On this 16th day of July, 1897, before me, Florence Couthoui, a notary public in and for the county of Cook, State of Illinois, personally appeared Mary A. Davis, wife of Edward A. Davis, known to me to be the person

whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] FLORENCE COUTHOUI,

Notary Public in and for the County of Cook, State of Illinois.

State of Montana, County of Silver Bow. } ss.

On this 19th day of August, 1897, before me, L. Orvis Evans, a notary public in and for the county of Silver Bow, State of Montana, personally appeared George W. Davis, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] L. ORVIS EVANS,

Notary Public in and for the County of Silver Bow, State of Montana.

State of Illinois, County of Cook } ss.

On this 13th day of July, 1897, before me, Nellie M. Lewis Panushka, a notary public in and for the county of Cook, State of Illinois, personally appeared Morris A. Davis, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] NELLIE M. LEWIS PANUSHKA,
Notary Public in and for the County of Cook, State of Illinois.

State of Montana, }
County of Silver Bow. } ss

On this 25th day of June, 1897, before me, L. Orvis Evans, notary public in and for the county of Silver Bow, State of Montana, personally appeared Charles M. Demond, known to me to be the person whose name is subscribed to the within instrument as attorney in fact of Elizabeth S. Bowdoin, John A. Bowdoin, Harriet Wood and Calvin P. Davis, and acknowledged to me that he subscribed the names of Elizabeth S. Bowdoin, John A. Bowdoin, Harriet Wood and Calvin P. Davis thereto as principals, and his own name as attorney in fact.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] L. ORVIS EVANS,
Notary Public in and for the County of Silver Bow, Montana.

State of Montana, }
County of Madison. } ss.

On this 28th day of June, 1897, before me, Augustus Anderson, a notary public in and for the county of Madison, State of Montana, personally appeared John E.

Davis, known to me to be the person whose name is subscribed to the within instrument, as administrator of the estate of John A. Davis, deceased, and acknowledged to me that he executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] AUGUSTUS ANDERSON,
Notary Public in and for the County of Madison, Montana.

State of Massachusetts, }
County of Hampden. } ss.

On this 8th day of July, 1897, before me, George D. Lang, a notary public in and for the county of Hampden, State of Massachusetts, personally appeared Elizabeth S. Ladd and Charles H. Ladd, her husband, both personally known to me to be the individuals described in and whose names are subscribed to the foregoing agreement, and who severally acknowledged to me, each for himself and herself, that they executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] GEORGE D. LANG,
Notary Public in and for the county of Hampden, State of Massachusetts.

State of Massachusetts, } ss.
County of Hampden. }

On this 8th day of July, 1897, before me, George D. Lang, a notary public in and for the county of Hampden, State of Massachusetts, personally appeared Mary Louise Dunbar, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] GEORGE D. LANG,
Notary Public in and for the County of Hampden, State of Massachusetts.

County of Hampden. } ss.
Commonwealth of Massachusetts, }

On this 7th day of July, 1897, before me, Henry N. Bowman, a notary public in and for the commonwealth of Massachusetts, personally appeared Ellen S. Cornue and Joshua Cornue, her husband, both personally known to me to be the individuals described in and whose names are subscribed to the foregoing agreement, and who severally acknowledged to me, each for himself and herself, that they executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] HENRY N. BOWMAN,
Notary Public in and for the Commonwealth of Massachusetts.

State of Massachusetts, } ss.
County of Hampshire. }

On this 8th day of July, 1897, before me, Wm. C. Eaton, a notary public in and for the county of Hampshire, State of Massachusetts, personally appeared Sarah Maria Cummings, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In testimony whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal] WM. C. EATON,
Notary Public in and for the County of Hampshire, State of Massachusetts.

[Endorsed]: A. J. Davis et al. with Elizabeth S. Bowdoin et al. Contract dated June 22, 1897, No. 58. Harriet Wood vs. A. J. Davis et al. Complainants' Exhibit. Contract of Settlement. C. W. B., Spec. Examiner, June 21, 1898.

The next exhibit in regular order is record of bank suit, to be found commencing at p. 1091 of this record.

Complainant's Exhibit, "Notice to Produce."

(June 21, 1898, C. W. B., Special Examiner.)

In the Circuit Court of the United States, Ninth Circuit, District of Montana, Southern Division,

HARRIET WOOD,

Complainant,

vs.

ANDREW J. DAVIS, JR., FIRST NATIONAL BANK OF BUTTE, MONTANA, JAMES A. TALBOTT, Formerly Special Administrator, etc., of Andrew J. Davis, Deceased; JOHN E. DAVIS, as Administrator etc., of John A. Davis, Deceased, and JOHN H. LEYSON, as Administrator with the Will Annexed, etc., of Andrew J. Davis, Deceased,

Defendants.

Sirs: Take notice that you are required to produce upon the hearings before Charles W. Blair, Esq., special examiner herein, the following papers now in your custody or control, or that of your clients, and that upon failure so to do, secondary evidence will be given in proof of the same:

A certain deed and contract dated June 22, 1897, between the defendants, Andrew J. Davis and others, and the complainant Harriet Wood and others.

Also a certain letter dated July 6, 1894, from W. C. Darnold to Andrew J. Davis, a copy of which is annexed to the bill of complaint herein.

Also all of the papers, books, documents, agreements, and other papers referred to in the bill of complaint herein or in the said agreement dated June 22, 1897, and all other books, papers, or documents in any way bearing upon the matters in controversy, and set forth in the said bill of complaint.

Dated, Butte, Montana, June 15, 1898.

W. L. LOGAN and
L. P. DRENNEN,
Solicitors for Complainant.

To W. W. DIXON and
FORBIS & FORBIS,
Solicitors for A. J. Davis, Jr., etc.

WILLIAM SCALLON,
Solicitor for Defendant, Talbott.

E. W. HARWOOD,
Solicitor for Defendant, John E. Davis.

J. W. COTTER and
WILLIAM SCALLON,
Solicitors for Defendant Leyson.

Due and timely service of a copy of the foregoing notice to produce is hereby admitted.

Dated, Butte, Montana, June 15, 1898.

WM. SCALLON,
For Talbott.

J. W. COTTER and
WM. SCALLON,
For J. H. Leyson.

JAMES W. FORBIS,
Atty. for Defts. A. J. Davis and The First National Bank.

E. N. HARWOOD,
Solicitor for John E. Davis, Adm. of John A. Davis, Decd.

[Endorsed]: No. 58. Wood vs. Davis, Complainant's Exhibit, Notice to Produce. June 21, 1898. C. W. B. Spl. Examiner.

Complainant's Exhibit, "Typewritten Letter, dated July 6th, 1898."

(June 21, 1898. C. W. B., Special Examiner.)

Butte, Mont., July 6, 1896.

Mr. A. J. Davis, Esq.

Dear Sir: Having made several unsuccessful attempts to meet and have an interview with you, and failed, I adopt this method of placing before you the circumstance as I see it. You are aware that in my testimony I strained a very great point, and in doing so accomplished for you 1072000.00 one million and seventy-two

thousand dollars, and I feel that any circumstances that might arise that would change or impeach that testimony would be both disastrous to you and myself. In order to avoid that I desire to place before you the following conditions, to wit:—

That you deal with me straight, and through no second or third parties, and that I bind myself to carry out every obligation that I have made. There is strong pressure brought to bear upon me to rescind my testimony or the portion of it as to dates, which I am fully guaranteed that if I do, will result in nothing disastrous to me, but, if you will comply with the requirements herein stated, I will quietly leave this country, and under no circumstances return again.

You know my family affairs, my wife will not come again to Montana, and I cannot live without her, and I was assured in my interview with her a few weeks ago that she would not come again, and I have this proposition to offer to you, and it will be a final, and it is not a hundredth part of what my, the only direct testimony in the case, of which I have been assured by the most eminent counsel in this country and Ohio is the case, that my own, and mine alone was the pivoting and only testimony which gained to you 1,072,000.00 dollars.

Now, to be candid, and as final to everything connected with these affairs, under no circumstances will it ever arise again through any pressure that may be brought to bear upon me by the opposing party, I will state that I want 10.000.00 ten thousand dollars, in consideration of which I agree to go back to Ohio, go into business, stay there, and return to Butte subject to no-

body's orders but your own, which may only effect subsequent business of your own, and that if you will deal with me personally, and with nobody else, I will religiously carry out every stipulation in this instrument.

I am very serious in this thing, and want you to know that I have positive assurance that if I rescind my testimony, even to the verge of perjury, that I will be fully protected to any amount. I do not do this in the form of a threat, but, only as a reasonable consideration for what I know I have done for you.

Candidly consider this without bias, weigh every point in the case. I place myself in jeopardy in doing this, yet I do it with my eyes open. No other consideration except the above stated will go. Give me a hearing at John Davis's store to-morrow at 2 o'clock P. M. as that is the extreme limit that I have from other sources.

Copy. Yours truly,

The next exhibit in regular order is letter of Feby. 19, 1890, shown at page 262 of this record and is not here repeated.

Complainant's Exhibit, "Darnold Affidavit."

(No. 58. Harriet Wood et al. vs. A. J. Davis et al. Darnold Affidavit. Dated July 12, 1894. June 21, 1898. C. W. B., Spl. Examiner. Endorsed: McConnell, Clayberg & Gunn, Attorneys, Helena, Montana.)

In the District Court of the —— Judical District, in and for the County of Silver Bow, State of Montana.

JAMES TALBOTT, Special Administrator of the Estate of A. J. Davis, Senior, Deceased,

vs.

A. J. DAVIS, Junior, and the First National Bank of Butte.

State of Montana,
Lewis & Clarke County, } ss.

Personally appeared before the undersigned, a notary public in and for said county and State, William C. Darnold, and made oath in due form of law that he is the same William C. Darnold who testified in behalf of the defendants in the above-entitled cause upon the trial of same in the District Court of Silver Bow county; that for several months before he did so testify, he had been drinking, and had at times taken chloral, when suffering from nervous prostration; that he was out of employment and des-

titute, and had been for sometime, and was much depressed in mind; that while in this morbid condition of mind, he delivered the testimony given upon said trial.

Affiant further states that said testimony was not true; that he had no such conversation as detailed in said testimony with A. J. Davis, Senior, Deceased, but that he did have a conversation with said A. J. Davis, Senior, deceased, about the latter part of August, 1886, at which time he was engaged as bookkeeper in the First National Bank of Butte, and had had some trouble with his books with the defendant, A. J. Davis, Junior, and in the conversation that he had about the last of August, 1886, with A. J. Davis, senior, he complained to him of the treatment of said defendant, A. J. Davis, junior, when the said deceased said to him that he had better go back to work, as Andy (referring to A. J. Davis, Junior) would eventually own the bank; that this was the only conversation he had with said Deceased in regard to the defendant, A. J. Davis, Junior, owning the bank; that all he stated upon the witness stand in reference to the conversation had with said Deceased shortly before he died, stating to him in substance that he had given the stock of the defendant, the First National Bank, to the defendant, A. J. Davis, Junior, is not true; that the said Deceased at said time and place, nor at any other time and place, made any such statement to him.

Affiant further states that, while no one had offered him any consideration, or made him any promises to induce him to give the above testimony, he was led to believe, while in the morbid condition of mind above referred to, that he would be liberally rewarded by the

defendants for so great a favor as giving the testimony which he did give would be.

Affiant further states that an hour or so after he had testified, one Myer Ganzberger, a resident of the city of Butte, with whom affiant was well acquainted, came to him on the street and asked him if he did not wish to take a drive to Gregson's Springs, situated about 18 miles from Butte City; that affiant agreed to go with said Ganzberger to said springs, and they went to a livery stable and procured horses and buggy and drove to said Gregson's Springs; that while affiant and said Ganzberger were at said Springs, said Ganzberger made arrangements with the proprietor thereof for affiant to return and spend some days at said springs, and that affiant did so return and remain there from Saturday until the following Thursday; that on Tuesday of the same week, said Ganzberger came to said Springs and proposed to affiant to go to California, but affiant said that he had been to California, but, if he was allowed to choose, he would prefer to go to his old home in Piqua, Ohio, and this was agreed to by said Ganzberger.

Affiant further states that, according to this agreement, he was taken by said Ganzberger to Piqua, Ohio, where affiant remained some two and a half weeks, but said Ganzberger went to Washington, D. C., or left affiant for the avowed purpose of going to said Washington City, and aterwards affiant received a telegram from said Ganzberger to meet him in Cincinnati, which affiant did, and they returned to Butte City, arriving there some ten or twelve days ago.

Affiant further states that said Ganzberger paid all of his expenses on this trip, and paid his bills, or had them charged to himself, at Gregson's Springs; that, while on said trip said Ganzberger said to affiant a number of times that, if he went through this all right, or words to that effect, that he would be well fixed for the remainder of his life.

Affiant further states that he makes this affidavit voluntarily, to the end that he may repair the wrong done by his testimony.

W. C. DARNOLD,
Affiant.

Subscribed and sworn to before me this 12th day of July, A. D. 1894.

[Notarial Seal] O. W. McCONNELL,
Notary Public in and for the County of Lewis & Clarke.

Defendants' Exhibit "A," "Letter, Boyce to Mrs. Darnold."

(6-21, '98. C. W. Blair, Spl. Examiner.)

Butte, Montana, June 13th, 1894.

Mrs. Darnold, Piqua, Ohio.

Dear Madam: For past 6 mos. Mr. Darnold has been stopping at my house and treated as kindly as if he were related to us. There was nothing that my wife and self could do but what was done to add to his comfort and convenience. I relied upon Mr. Darnold to tell the truth and nothing but the truth in behalf of the co-partnership investment of Mr. A. J. Davis, deceased, wherein he invested equal amounts with me in the dry goods business, which the Bank came in and destroyed, and ruined me.

Mr. Darnold was my principal witness and knew the facts referred to. The Bank got Mr. Darnold to testify to a death bed gift of A. J. Davis to his nephew Andy Davis, and Mr. D. swore that he was present at his death bed in 1890, and for this testimony Andy Davis sent Mr. Darnold east in company with Mr. Meyer Gensberger, who accompanied as far as Piqua. The Bank is desirous of keeping Mr. Darnold away until my case comes off, thereby attempting to destroy his testimony in my behalf. I have never done Mr. Darnold an injury in my life. I have always had the kindest feelngs for him, and why he should go away for a few paltry dollars and injure me is a mystery beyond my comprehension. As soon as I could recover money due me; I intended to go into business somewhere and have Mr. Darnold with me. I felt that I could do him good, and he likewise could be of service to me, and that he would be able to lead a useful life. Of course I am left to fight my battle alone, unless he is manly enough to come to my aid, and thereby not only do his duty as a man, but protect his interest as a good citizen. If you have influence over him, urge him to not leave me, and go at the call of men that would use him and then leave him to his own fate. They care nothing for him. They would not have given him home or shelter for one day, much less the months and months that I have stood by him. He must remember that this life is not all, and that the kindnesses shown him by my wife and self have been of a higher character than that which would debase him. If there is a spark of true manhood in him, have him remain where I can call him. The eastern creditor is getting ready to open their cases, and we

need Mr. Darnold. If he will write to Farwell & Co., and state to them the facts, or go to them, they will not only appreciate the interest he will take in assisting them to get their rights, but will not doubt give him employment, and will probably aid him in being the useful man that he has been in the past; and as soon as I recover from my losses, I will see that he shares my propperity. I ask nothing of him but Right, to aid me in overcoming Might. If you don't see him in person, forward this letter to him, that he may keep me posted as to his whereabouts. He did not bid us Good-Bye when he departed. Kindly give me his address, and I will keep up correspondence with him. Yrs. Respt.

J. R. BOYCE, Jr.

Defendants' Exhibit "B," "Letter, Boyce to Darnold."

(C. W. Blair, Spl. Examiner. 6-21, '98.)

Butte, Montana, Jan. 14th, 1896.

W. C. Darnold, Esq., Piqua, Ohio.

Dr. Sir: I wrote you some time ago, but received no reply. The cases of Eastern Creditors of the firm of J. R. Boyce, Jr., & Co. will come to trial in the next 60 or 90 days at farthest. Will you give testimony to the facts and truths known to you or not? If so, will you come here, or shall I send depositions to be sent you. I am preparing to follow with a suit; against the bank, for wrong procedure, for the $60,000.00 investment, under an accounting, which has been twice paid to the bank. Thoroughman and Judge Henry L. Warren, formerly a Chief Justice of this State, will be here in my interests.

I hope to be successful against the bank. Inasmuch as I owe it largely to your knowledge of books in bringing to light the errors contained therein, I feel in duty bound to reimburse you for labor performed in the event I regain the losses sustained in and by the wrongful proceedings of the bank. Your knowledge of the firm books makes you a material witness in righting a wrong. As you know you will not have to strain a point in behalf of myself; all that is required is simply to tell the truth as to Davis' business relation with the firm. Your affidavit in regard to correcting a former wrong is safe in my hands. The Supreme Court has sustained the decision of Judge McHatton and given Andy the Bank. This ungrateful little rascal rolls in the wealth that you have given him, and unless he has given you something, more than he did while you were here for that which he knew was the only testimony that gave him the bank stock, he is inhuman, to say the least of it. At your command you can throw him behind the bars, for he paid you through his bro. and Meyer Gensberger for false testimony, when he knew that you were under the influence of liquor. He feels his security, however, and apparently fears no danger from either you,—or me—. I have no desire to heap vengeance upon any man, but must say that this is a cold-blooded transaction upon the part of Andy Davis, and there is many a poor fellow behind the bars that has done nothing compared to his acts. You did right in making an acknowledgment of your wrong; it was manly and just. Judge Noah McConnell's written guarantee to you was held sacred by Toole, Clayberg & McConnell. Why? Because Judge McConnell gave an written instrument to

you, which, if your affidavit had been used, would have gotten the Judge in a very grave position. I produced both documents, which were ret'd to me unused for reasons stated. Let me hear from you. Yours truly,

J. R. BOYCE, Jr.

Defendants' Exhibit "C," "Letter, Boyce to Darnold."

(June 21, 1898. C. W. Blair, Spl. Examiner.)

Butte, Montana, June 17, '94.

W. C. Darnold, Esq., Piqua, Ohio.

Dear Darnold: Notwithstanding you left, without bidding any of us good-bye, I cannot for one moment think that you have deserted me, just as we are on the eve of victory. Of course your evidence is material, inasmuch as you know the facts and are able to state truthfully your knowledge of same, so far as the partnership relations remaining unchanged up to the time of the death of Davis. I cannot believe that you would suppress this evidence, by remaining away under circumstances such as those that brought you to me, and your volunteer services in behalf of creditors and myself. I have frequently called attention to Farwell & Co. to the position you held and intended to mention in behalf of their interests and other creditors, reminding them of your telegram to them, &c., thus placing you before them as not only being worthy of recognition, but fully capable of holding important positions in their employ. I think they will recognize your interest in their behalf and will be able to aid you in getting a good situation until such a time as you may do better. You well know the great wrong that

has been perpetrated upon eastern creditors and myself, and you cannot conscientiously remain silent from any standpoint, and close your lips against such infamy. I cannot believe that money would induce you to remain away, and thus suppress the truth of your knowledge, particularly as my acts have been uniformly kind and generous in feeling. I had no motive in my kindness and the extenuation of home courtesies farther than to bring out the truths, too well known to be suppressed. You well know that my home was always open to you, and you were welcome therein. Whether I needed your evidence or not. You also know that there are "patched up" entries on the books of J. R. B., Jr., & Co., which should be exposed in the interests of truth and honor. That these entries were made by unscrupulous persons for purposes too base to dwell upon. That conscience caused one of them to admit, on death bed, that said entries were false and would in time redound to my credit. My faith in you has not been weakened, and I believe that when the time comes you will not be found wanting.

I confess that this faith in you is of a character that cannot be shaken until positive proof is shown that you are lower in the scale of manhood than others that have so deeply wronged me. I have always known you as an honest man; you proved yourself as such when in our employ. Now that you are more mature in thought and ripe in experience, it can not be possible that you would wantonly absent yourself and thus do me a greater wrong by silence than to be openly and avowedly my enemy. So far as I am personally concerned, it matters but little whether or not I regain my rights. I am willing to go

unrewarded so far as this world's goods are concerned, but to suppress the truth, withhold same, to detriment of other's interests, when in our power to restore their rights that so largely rest in us, is a crime against justice, to say nothing of that greater crime against the Higher Law given us by those God-given-powers, which forms the basis of all transactions both here and hereafter. The restoration of these rights will bring us power, and strength such as any mercantile community must recognize, and will recognize in time, to our own good. We have a two-fold interest at stake, one of them is self-respect (the foundation of true manhood). The other the restoration of rights that are lost and can only be regained through us. Can we pass either of these by and be honest men? We are all beset with temptations, and often allow evil thoughts to carry us astray, but manhood again reasserts himself, and we live beyond the allurements which selfishness has at one time placed her signet upon. We are all weak at times and easily "played upon." The lute of our souls catch the unnatural strains of self-polluted gains, and we often further schemes as cruel as those enacted in the Darker Ages. Re-asserted manhood regains her lost strength and conscience (that silent monitor), that remained dormant under the throes of selfishness, comes back again gently stealing through our breasts, and we throw open wide the gates that she may re-enter and purify the inner man. We then bid defiance to the boldness of our would-be possessor, and put him to shame for having wrung from us (to his own advantage) an independence for which he casts a morsel at our door. Neither you nor I are men to be used solely for unholy

purposes by intuition, education and inclination, we are just and true. Are we to be "played" upon and then "spit" upon? Can we further the interests of those that are waging an unholy war upon others? I cannot believe that you will do me an intended wrong, while I confess that your sudden going was a mystery, yet I am loathe to think you have gone for good. Your testimony in regard to the dying gift (the death-bed gift), of Judge Davis to Andy was a surprise that gave Andy a million of dollars (for upon your evidence alone rests his case). Other evidences were far "fetched,"—yours being being the last words of a dying man, passing from life, to give an account in death. Of course, I was astonished that you alone held the key of Andy's fate. I well knew of your conversation with the Judge, as you related it to me; that occurred in 1887, when Andy discharged you and you went to the sick-room of the Judge in that year, 1887, but did not know that you were present at the last moments of the Judge in 1890. Upon your words "hung the law and the testimony," and Andy's claim for the bank. Now that he has it, let him enjoy it, but let us not forget to bring out the truth and make him disgorge wrongful gains, which he holds under the law, but in violation of truth and the facts best known to yourself and myself. Kindly write me, and say if you will return in the interest of justice. I will see that you have transportation furnished, &c., "both ways." In the meantime apply to Farwell & Co. for a position, and in the end we will gather strength and regain our losses and former standing. With kind wishes, I am, Yrs. &c.

J. R. BOYCE, Jr.

Complainant's Exhibit, "Copy Darnold Letter."

(June 21, '98. C. W. B., Spl. Examiner. Endorsed: Copy of Letter, W. C. Darnold to A. J. Davis, Jr. Attested by J. H. Curtis.)

Copy of letter read by me. J. H. C.

Copy of typewritten letter handed me by W. C. Darnold. J. R. B., Jr.

Butte, Mont., July 6th, 1894.

A. J. Davis, Esq.

Dear Sir: Having made several unsuccessful attempts to meet and have an interview with you, and failed, I adopt this method of placing before you the circumstance as I see it. You are well aware that in my testimony I strained a very great point, and in doing so accomplished for you one million and seventy-two thousand ($1,072,000) dollars, and I feel that any circumstances that might arise that would charge or impeach that testimony would be both disastrous to you and myself. In order to avoid that, I desire to place before you the following conditions, to wit: That you deal with me straight and through no second or third parties, and that I bind myself to carry out every obligation that I have made. There is strong pressure brought to bear upon me to rescind my testimony, or the portion of it as to date, which I am fully guaranteed that if I do, will result in nothing disastrous to me, but, if you will comply with the requirements herein stated, I will quietly leave this country, and under no circumstances return again.

You know my family affairs; my wife will not come again to Montana, and I cannot live without her, and I was assured in my interview with her a few weeks ago that she would not come again, and I have this proposition to offer you, and it will be a final, and is not a hundredth part of what my—the only direct testimony in the case, of which I have been assured by the most eminent counsel in this country and Ohio in the case, that my own and mine alone was the pivoting and only testimony which gained to you one million and seventy-two thousand ($1,072,000) dollars. Now to be candid and as final to everything connected with these affairs, under no circumstances will it ever arise again through any pressure that may be brought to bear upon me by the opposing party, I will state that I want ten thousand $10,000.00 dollars, in consideration of which I agree to go back to Ohio, go into business, stay there and return to Butte subject to nobody's orders but your own, which may only effect subsequent business of your own, and that if you will deal with me personally and with nobody else, I will religiously carry out every stipulation in this instrument.

I am very serious in this thing and want you to know that I have positive assurance that if I rescind my testimony, even to the verge of perjury, that I will be fully protected to any amount. I do not do this in the form of a threat, but only as a reasonable consideration for what I know I have done for you. Candidly consider this without bias, weigh every point in the case. I place myself in jeopardy in doing this, yet I do it with my eyes open. No other consideration except the above stated will go. Give me a hearing at Jno. Davis' store to-morrow at 2

o'clock P. M., as that is the extreme limit that I have from other sources.

(Signed) Yours truly,

W. C. DARNOLD.

(True copy.)

[Written in margin:] Copy of letter read by me. J. H. C. July 7, 1894.

Defendant's Exhibit. (Endorsement.)

(C. W. B., Special Examiner.)

Law office of Corbett & Wellcome, Butte, Montana.

Property of J. R. Boyce.

Original affidavit and copy of letter of Darnold in re Darnold evidence in bank stock case.

Complainant's Exhibit "A," "Subpoena Duces Tecum."

(June 30, 1898. C. W. B., Special Examiner.)

The President of the United States to Andrew J. Davis, Jr., President of the First National Bank of Butte, Montana, Greeting:

You are hereby commanded that all business and excuses being laid aside, you appear and attend before Charles W. Blair, Esq., a special examiner duly appointed by the Circuit Court of the United States for the District of Montana, and authorized to examine you as a witness in a suit in equity, depending undetermined in the said Circuit Court, wherein Harriet Wood is complainant and Andrew J. Davis, Jr., and others are defendants, on the part of the complainant at the United States courtroom in the Postoffice building at the City of Butte, Montana, on the 30th day of June, 1898, at 2 o'clock in

the afternoon to answer truly all such questions as shall then and there be asked of you.

And you are further commanded to bring and produce with you at said time all books, accounts, papers and other documents of the First National Bank of Butte, Montana:

1. Showing or tending to show any indebtedness to said bank from any of the following persons, in the year 1894, and especially in May of 1894, viz.: Conrad Kohrs, Daniel W. Dillinger, Geoffrey Lavelle, Joseph Broughton, W. W. McCracken, Charles Eltinge, J. E. Gaylord, George A. Tong, D. L. Balch, Charles F. Mussigbrod, William H. Heald, Charles S. Warren, Hiram Knowles, James A. Talbott, John E. Davis, William I. Lippincott, Guy X. Piatt, Meyer Gansberger.

2. Showing or tending to show any indebtedness of John H. Leyson to said bank in 1895, and in March, 1895, and since then, and also the accounts of said Leyson with said bank.

3. And also showing or tending to show who were stockholders of said bank on March 11, 1890, and who have since been stockholders of said bank.

4. And also showing or tending to show what persons were directors and officers of said bank on March 11, 1890, and who the directors and officers have been since then.

5. And also all books or documents showing or tending to show all dividends paid the stockholders of said bank since March 11, 1890, and all the amounts divided as surplus or undivided profits during such time.

6. Also all books showing or tending to show all moneys, profits or dividends drawn by Andrew J. Davis,

Jr., since March 11, 1890, and all amounts to the credit of Andrew J. Davis, Jr., in said bank.

7. And also all books showing all moneys drawn by or paid to James A. Talbott during said time as well as the accounts of said Talbott with said bank.

8. Also all books, documents and all papers showing all transactions between William C. Darnold and said bank or said Andrew J. Davis, Jr., or said John E. Davis or said James A. Talbott since January first, 1894.

10. Also a certain proxy to vote upon the stock of Andrew J. Davis, deceased, issued for the meeting held in January, 1890.

11. Also all other books, documents or papers in possession of said bank in any way bearing upon or affecting the matters in controversy in said action.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States at the city of Butte, Montana, on the 29th day of June, in the year one thousand eight hundred and ninety-eight, and of the independence of the United States of America, the one hundred and twenty-second.

[Seal] GEO. W. SPROULE,
Clerk.
By Charles W. Blair,
Deputy Clerk.

W. S. LOGAN, and
C. P. DENNEN,
Solicitors for Complainant, 115 North Main St., Butte, Montana.

[Endorsed]: Filed June 30th, 1898. Geo. W. Sproule, Clerk. By Charles W. Blair, Deputy Clerk.

United States Marshal's Office, }
District of Montana. }

I hereby certify that I received the within writ on the 29th day of June, 1898, and personally served the same on the 30th day of June, 1898, on Andrew J. Davis, Jr., President of the First National Bank of Butte, Montana, said witness named therein personally at Butte, in the county of Silver Bow, in said District, by delivering to and leaving with said witness a copy thereof.

Butte, June 30th, 1898.

J. P. WOOLMAN,
U. S. Marshal.
By David Meiklejohn,
Deputy.

[No. 58. Harriet Wood v. A. J. Davis et al. Complainant's Exhibit "A." Filed June 30th, 1898. C. W. B., Special Examiner.]

Complainant's Exhibit, "Bank Statement."

(July 6, 1898. C. W. B., Special Examiner.)

Statement of the condition of the First National Bank, Butte, Montana, at close of business, March 9th, 1897.

Resources.

Loans and discounts		$1,369,836.37
U. S. Bonds to secure circulation par value		50,000.00
Other bonds and securities		126,431.03
Bank building and other real estate		18,000.00
United States Bonds on hand	150,000.00	
Due from banks	736,994.05	
Cash on hand	595,599.61	
Cash resources		1,482,593.66
Total		$3,046,861.06

Liabilities.

Capital stock	$ 200,000.00
Surplus and undivided profits	396,286.15
Circulation	42,400.00
Dividends unpaid	7,500.00
Deposits	2,400,674.91
Total	$3,046,861.06

In the Circuit Court of the United States, for the District of Montana.

HARRIET WOOD,
Complainant,
vs.
ANDREW J. DAVIS et al.,
Defendant.

Deposition of J. B. Clayberg.

The complainant in the above-entitled suit, and her attorneys, are hereby notified that the defendants herein will take de bene esse the testimony of John B. Clayberg, who resides at the city of Helena, in the State of Montana, who is about to go out of the District of Montana, in which the above suit is to be tried, and to a greater distance than 100 miles from the place of trial of said suit, before the time of said trial, for use at the trial hearing of said suit, on behalf of the defendants before Harry Harris a notary public, within and for the county of Lewis & Clarke, State of Montana, and who is not of counsel or interested in said suit, at room No. 31, in the Bailey Block, Main street, in the city of Helena, Lewis & Clarke county, Montana, on the 6th day of September, 1898, commencing at 2 o'clock P. M. of said day, and thereafter from day to day as the taking of said deposition may be adjourned, and such testimony will be

so taken in accordance with the provisions of sections 863, 864, and 865, R. S. U. S., and the equity rules.

Dated at Butte, Mont., Aug. 31, 1898.

(Signed) W. W. DIXON,
J. A. COTTER,
JOHN F. FORBIS, and
WM. SCALLON,
Solicitors for Defendants.

To C. P. DRENNAN, Esq.
Complainant's Solicitor, Main street, Butte, Montana.

State of Montana, }
County of Silver Bow. } ss.

J. K. MacDonald, being duly sworn deposes and says that he is a citizen of the United States and over the age of twenty-one years; that on the 31st day of August, 1898, he served upon C. P. Drennan, Esq., solicitor for the complainant in the case of Harriet Wood, complainant, vs. Andrew J. Davis, Jr., et al., defendants, a notice of which the foregoing is a true copy. That such service was made by personally delivering to and leaving with the said C. P. Drennan, personally, the original of said notice at his office on North Main street, Butte, Montana. And affiant further deposes and says that he is in no wise interested in said action.

J. K. MacDONALD.

Subscribed and sworn to before me this 5th day of September, 1898.

CHAS. F. ROE,
Notary Public in and for the County of Silver Bow,
State of Montana.

In the Circuit Court of the United States, for the District of Montana.

HARRIET WOOD, Complainant, vs. ANDREW J. DAVIS et al., Defendants.	

Be it remembered, that pursuant to the notice hereunto annexed, and on the sixth day of September, in the year of our Lord one thousand eight hundred and ninety-eight, at my office, room 31, Bailey Block, in the city of Helena, county of Lewis and Clarke, and State of Montana, at the hour of two o'clock P. M., before me, Harry Harris, a notary public in and for said county of Lewis and Clarke, duly appointed and commissioned to administer oaths, personally appeared John B. Clayberg, of lawful age, who being by me first duly sworn and cautioned to testify the truth, the whole truth, and nothing but the truth, touching the matters in controversy in the above-entitled action, was then and there examined and interrogated by W. W. Dixon, Esq., one of the solicitors for the defendants, the complainant not being represented by counsel, and thereupon said witness did depose, testify and say, as appears in his answers to the interrogatories following, to wit:

Direct Examination.

(By W. W. DIXON, Esq.)

What is your name and residence?

A. John B. Clayberg; reside at Henlena; 44 years old and occupation attorney.

Q. How long have you resided in Montana?

A. Nearly fourteen years.

Q. What is your business?

A. I am an attorney.

Q. How long have you been engaged in such business in the territory and State of Montana?

A. Since 1884.

Q. How actively have you been engaged in the practice of law in Montana and in what courts?

A. I have been engaged in all the courts of Montana rather actively, both State and Federal Courts.

Q. And in the Supreme Court of the United States?

A. Yes, sir.

Q. What official positions if any, have you held in the territory and State of Montana?

A. Nothing but attorney general. I was the last attorney general of the territory.

Q. Are you acquainted and have you been connected with the litigation in relation to and growing out of the estate of Andrew J. Davis, deceased? A. I have.

Q. Well, how long and how intimately?

A. I think it was in the year 1890 that I was first employed, and I have been in the different cases ever since.

Q. State in what matters relating to said estate you have been employed as attorney.

A. I was employed as attorney in the Supreme Court upon the matter of the administration of the estate, and afterwards—(interrupted)

Q. By the way, were you in the District Court in that contest in the administration?

A. No, I was not in that; I was in the higher court first.

Q. Go on, then.

A. And I was in the District Court on the probate of the will and the various matters of litigation that grew out of that, and also as attorney for Mr. Leyson, the administrator, in the case concerning the bank stock.

Q. That is called the bank stock case?

A. Yes, sir.

Q. By whom were you employed in the matter relating to said estate aside from the bank stock?

A. I was employed by Mr. Root, and the people who were with him.

Q. Who were they?

A. Mrs. Cornue, his sister, Mrs. Cummins, his aunt, Mrs. Ladd, his aunt, and Miss Dunbar, his cousin.

Q. Did you give Root's name?

A. Henry A. Root; I did not give it.

Q. Well, who was Mr. Root?

A. Mr. Root was a nephew of Andrew J. Davis, deceased.

Q. Was he or not one of the heirs of Andrew J. Davis?

A. Yes, sir; he was.

Q. That is, supposing he died intestate?

A. Yes, sir; he was heir at law.

Q. What was the nature of the proceedings in relation to the appointment of an administrator of the estate?

A. As I recollect it, John A. Davis, a brother of the deceased, and Henry A. Root both applied for letters of administration, and the contest was upon the appointment of John A. Davis, as I recollect.

Q. What court was that contest in?

A. It was in the District Court of Silver Bow county, and was afterwards appealed to the Supreme Court. I appeared in the Supreme Court; did not appear in the District Court; had nothing to do with it there.

Q. In what court was the contest in relation to the will pending?

A. In the District Court of Silver Bow county, in Butte.

Q. Were you engaged in that as counsel?

A. I was, upon the contest of Henry A. Root and Maria Cummings?

Q. What was the result of the trial?

A. The jury disagreed.

Q. State, if you know, who were the attorneys for James A. Talbott, administrator of the estate of Andrew J. Davis, deceased, in the suit against Andrew J. Davis, and the First National Bank of Butte, called the bank stock case?

A. Toole & Wallace, McConnell, Clayberg & Gunn, and W. F. Sanders.

Q. Who attended to the trial of the case in court?

A. E. W. Toole, W. F. Sanders and myself.

Q. Do you recollect what year that was?

A. I think it was in '94; I think it was commenced in '94, I am not sure.

Q. Who employed you or your firm in that suit?

A. Mr. Talbott.

Q. Who paid your fees in the case?

A. Mr. Talbott paid a portion of them and after the permanent administrator Mr. Leyson was appointed, he paid the balance.

Q. If I understand you correctly, the firm of which you were a member and Mr. Toole, were interested in this litigation, but you and Mr. Toole took the active part? A. That is right.

Q. Who was the McConnell who was at that time a member of the firm of McConnell, Clayberg & Gunn?

A. N. W. McConnell, at one time Judge of the Supreme Court of the State of Montana.

Q. In the appeal of the bank case to the Supreme Court of the State of Montana, who attended to the case on appeal and argued it?

A. I think Mr. Toole and I argued the case on appeal.

Q. Did you or not prepare briefs in that case?

A. I did, I think.

Q. Mr. Toole, also? A. Yes, sir.

Q. Did you or not take part in the bank stock case when it was appealed to the Supreme Court of the United States?

A. Yes; I did not prepare any brief on that matter; Mr. Toole prepared it. I discussed the matter with Mr. Toole.

Q. Have you or not been employed as counsel for Mr. Root and the persons associated with him in everything

connected with this Davis estate, since you first went into it?

A. I think everything except a controversy between Root and Mrs. Ladd that is now pending in the United States Court in Butte.

Q. Have there or not, Mr. Clayberg, been a great many legal matters, negotiations and compromises between Mr. Root and his associates and the other parties interested in the Davis estate?

A. Yes, sir; there have been a great many compromises and settlements.

Q. Did you participate in those?

A. I think I did in every one of them.

Q. What interest, if any, had Mr. Root and his associates in this bank stock case?

A. As heirs at law to deceased in the estate of A. J. Davis; had we won the bank stock case, it would have increased the assets of the estate.

Q. Well, in this bank stock case, were you or not representing Mr. Talbott, as well as Mr. Root and his associates?

A. Yes, sir; I think we were. Mr. Talbott, when he employed us, told us he employed us because we had been attorneys for some of the heirs at law and for that reason he said he employed us.

Q. The interest of Mr. Talbott as administrator and Mr. Root and his associates was the same, was it not?

A. Yes, sir; it seemed to me to be so in that case.

Q. When Mr. Talbott employed you and Mr. Toole in this bank stock case, state, as near as you can remember,

what directions and instructions he gave you in regard to the conduct and prosecution of the case.

A. His instructions were to go ahead and fight it to the best of our ability and win it if we possibly could.

Q. State whether or not Mr. Talbott stated to you what he knew about the case himself or what facts he knew in reference to it.

A. I don't think I ever had any talk with Mr. Talbott concerning the facts in the case. Mr. Toole I had several talks with; Mr. Talbott I don't think I ever had.

Q. Did you afterwards?

A. I don't think I did at all.

Q. You had no special instructions from him, then, as I understand it, further than to go ahead and do the best you could with the case?

A. No, sir; I did not recollect of any at all.

Q. Did you or not at that time that he had been present at the time of the alleged gift of the stock?

A. I knew that he testified in the District Court of Silver Bow county on the matters of administration that he was present and testified concerning the gift.

Q. Had you or not seen his testimony?

A. Yes, sir; I had.

Q. Given on the hearing of the application for letters of administration? A. Yes, I read it all.

Q. Do you know Mr. Leyson, administrator of the will annexed? A. Yes, sir.

Q. State whether or not he ever employed you or Mr. Toole.

A. Yes, sir; after he was appointed administrator he instructed Mr. Toole and I to go ahead with the case.

Q. What instructions, if any, did you receive from Mr. Leyson?

A. I think nothing further than to argue the case in the Supreme Court and to do what we could in regard to it.

Q. Please state, Mr. Clayberg, whether or not Mr. Talbott or Mr. Leyson ever told you or intimated to you in any way, that they or either of them, desired you to do anything in the bank stock case to favor Mr. Davis' claim to the stock.

A. No, sir; they did not.

Q. Do you know Mr. James R. Boyce, Jr.?

A. Yes, sir.

Q. State whether or not he was a witness in the District Court on the trial of the bank stock case.

A. He was.

Q. For whom?

A. I think he was called for the plaintiff.

Q. Do you know whether or not Mr. Boyce made an affidavit in the motion for new trial?

A. Yes, sir; he did.

Q. Does that appear in the transcript of the proceedings? A. Yes, sir.

Q. Have you read Mr. Boyce's testimony given in this suit? A. Yes, sir.

Q. Do you know Mr. Darnold—Mr. William C. Darnold?

A. I never knew him or saw him until he testified on the stand in that case.

Q. Was he also a witness on the trial of the bank stcok case?

A. Yes, sir; a witness for defendant; I have never seen him since.

Q. State, if you know, what Mr. Boyce told you in reference to the entries in the books of J. R. Boyce, Jr., & Co., claimed to have been made by Darnold?

A. My recollection is that, after he was on the witness stand, he told us that Mr. Darnold had made entries or had directed his then bookkeeper to make entries after he had ceased to be employed by J. R. Boyce & Co. I don't think he ever told us that until after he was on the stand; he told us before he went on the witness stand that Mr. Darnold worked for the firm of which he was a member until the first day of March, and that there were entries made by him in the books of the firm during the month of February.

Q. When did he tell you that?

A. It was during the trial of the case before he was placed on the stand.

Q. Before Boyce was placed on the stand?

A. Yes, sir.

Q. State whether or not Mr. Boyce was examined on the stand in reference to this matter.

A. My recollection is that he was.

Q. State whether or not Boyce then testified as to the entries in the books by Darnold.

A. My recollection is that he did.

Q. State, if you remember, whether or not you and Mr. Toole asked Mr. Boyce to produce the books or examine them in reference to the dates of entries.

A. I do not know what Mr. Toole may have done; I never saw the books at all.

Q. Do you know whether or not Mr. Boyce was requested to produce them for your inspection?

A. I do not recollect.

Q. Who attended particularly to the matter of Boyce's testimony, if you remember?

A. Mr. Toole had a good deal more to do with it than any of the rest of us; he talked with Mr. Boyce and conducted the examination.

Q. You have seen, have you not, a transcript of the testimony given in the proceedings for letters of administration in 1890? A. Yes, sir.

Q. Do you remember from that transcript whether or not Andrew J. Davis, Jr., testified in that matter?

A. I believe he did.

Q. Did you or not ever see the record of his testimony? A. What record do you mean?

Q. Transcript of the testimony?

A. I saw the record on appeal to the Supreme Court, and I also saw a copy that was given to Mr. Toole, I believe, by the stenographer of the court who took his testimony.

Q. At or before the trial of the bank stock case had you not seen transcripts of testimony of A. J. Davis, Jr., given on the hearing for letters of administration?

A. Yes, sir; I had.

Q. Was or was not the testimony of A. J. Davis, Jr., given in the case of the application for letters of administration, read or used on the trial of the bank stock case?

A. I don't think it was.

Q. State, if you know, why it was not used.

A. My recollection of it is that Mr. Toole and Mr. Sanders took the position that if his testimony given in the matter of the application for letters of administration was used he would have an opportunity to come in and explain, and for that reason, they having objected to his being sworn as a witness in the case, they thought it best not to put his testimony in. I will say that my own judgment in reference to that was that he could not say anything except that the stenographer had not correctly taken down his testimony, or deny the matter stated in the testimony, but I agreed with Mr. Toole and Mr. Sanders that it was not advisable to put it in.

Q. Was it for that reason that you did not introduce it? A. Certainly.

Q. Was or was it not discussed at length?

A. It was discussed at length several times between Mr. Toole, Mr. Sanders and myself.

Q. Did or did not counsel confer as to the advisability of putting it in? A. Yes, sir; we all conferred.

Q. State, if you know, Mr. Clayberg, from the transcript on appeal in the Supreme Court in the matter of the application for letters of administration on the estate of Andrew J. Davis, deceased, what the issue in that case was, and how this testimony of A. J. Davis came in.

A. My recollection is that the A. J. Davis testimony came in in reference to the amount of the estate; if the bank stock had been delivered to him and given to him, it was not a part of the estate, and if it had not, it belonged to the estate and increased the assets considerably.

Q. Well, would it or not, also make a difference in regard to the bond?

A. Yes, sir; it certainly would require a larger bond if it belonged to the estate.

Q. State, if you remember, whether Andrew J. Davis testified on the trial? A. No, sir.

Q. Why not?

A. He was offered as a witness, but we objected to his being sworn because the testimony he would give was equally within the knowledge of the deceased.

Q. And what did the Court rule on the objection?

A. The Court excluded the matter.

Q. State, if you remember, whether Mr. Talbott testified on the trial of the application for letters of administration. A. Yes, sir; he did.

Q. Was or was not his testimony reported and taken down? A. It was.

Q. Was, or was not his testimony in that proceeding used upon the trial of the bank stock case?

A. He was asked upon cross-examination by Mr. Toole many of the questions that had been asked him in his former testimony and his reply was given, and he was asked whether or not he so testified.

Q. So that the testimony appeared in the record?

A. All that we considered material appeared in the record.

Q. Did you or not, or did or did not any of the counsel for plaintiff in the case, so far as you know, ever receive any direction or instruction from Mr. Talbott, as to the introducing or excluding on the trial of the bank stock

case, the testimony of Andrew J. Davis, as given on the hearing?

A. So far as I am concerned, I never had any conversation with Mr. Talbott in regard to it, and I do not think any of the others did.

Q. Is Mr. Henry A. Root an attorney?

A. Yes, sir.

Q. State whether or not during the progress of the trial of this bank stock case you and the other counsel for Mr. Talbott did or did not consult with Mr. Root in regard to the matters in the case.

A. Yes, sir; I know Mr. Toole and myself consulted with Mr. Root.

Q. Do you remember whether or not you consulted with him in regard to the propriety of introducing Andrew J. Davis' testimony given on his application for letters of administration?

A. I don't remember whether we did or not.

Q. Have you or not read the transcript of the testimony taken in this suit on the part of the complainant in regard to a certain affidavit made by one W. C. Darnold, relating to what he had testified to on the trial of the bank stock case? A. Yes, sir.

Q. State, if you please, all that you know about that affidavit—how it came to be made, what became of it, and all you know in regard to it.

A. I was in the east at the time the affidavit was made and did not know anything about it—in fact, never saw the affidavit. I had heard that such an affidavit was made, but it never came into my possession, and I never saw it in fact.

Q. Did you or not ever have any conversation with Mr. Darnold in regard to it?

A. No, sir; never spoke to him at all.

Q. Was or was not the question of using that affidavit on the motion for a new trial of the bank stock case ever discussed between yourself and the other counsel for the plaintiff?

A. Yes, sir, it was with Mr. Toole, and I think with Colonel Sanders also.

Q. Had the facts and circumstances under which that affidavit was procured been stated to you?

A. I think they were.

Q. And what, if you remember, was the conclusion reached in regard to the propriety of using it or not using it on the motion for a new trial?

A. My recollection is that it was stated by Mr. Toole that the affidavit was made by Judge McConnell, and that he gave Mr. Darnold his word that it would not be used unless he would not be prosecuted for perjury. We then took the affidavit of Mr. Boyce and Mr. Curtis to whom Mr. Darnold had made confession. We thought that it might involve Judge McConnell to introduce Darnold's affidavit, and inasmuch as we had the affidavits of Curtis and Boyce to whom he had made confessions, we felt that they ought to be equal to his affidavit.

Q. Were you present in the office of Corbett & Welcome—I think the firm was then in Butte—when this affidavit of Darnold's was produced and discussed?

A. No, sir; I do not think I was in the State at the time. I left Chicago on the 11th day of July and arrived

here on the 14th. I examined my correspondence this morning and find that on the 14th I sent a telegram to William Allen Butler, Jr., from here, and my recollection is that I sent it immediately upon my arrival.

Q. You do not think you were present, then?

A. No, I was not present.

Q. Did you or not, during the trial of the bank stock case and afterwards, have conversations with James R. Boyce, Jr., in regard to what he knew about the case?

A. Not personally and alone. I was present, however, when his affidavit was made and heard all that was said then.

Q. At the time that affidavit was made or before, so far as you know, was everything included in that affidavit that you or the other counsel thought material and that Mr. Boyce told you at that time?

A. I think it was; there were a good many things set forth in the affidavit that I had never heard of until the affidavit was made; for instance, his statement that Andrew J. Davis said certain things to him on the day of the funeral and at other times. I never knew anything about it until the affidavit was made on motion for a new trial. That affidavit, as I recollect it, was drawn in the McDermott hotel by a stenographer in the presence of Col. Sanders, Mr. Toole and myself.

Q. Did it or not at that time include everything that Boyce told you was material?

A. Yes, sir; everything that had not been brought out in the trial of the case; everything that he communicated to us after the trial of the case, that we thought was at all material, was placed in that affidavit.

Q. State, if you know, what interest, if any, James R. Boyce had in this bank stock case, directly or indirectly.

A. I know of no interest he had in it, but I heard that he had some suit with the estate concerning the partnership, but I never knew anything about it; it was all hearsay.

Q. Have you read the testimony of Mr. Frank E. Corbett given in this suit, upon the part of the complainant?

A. Yes, sir.

Q. Mr. Corbett is associated with you as a partner in the law practice now?

A. Yes, sir; and has been since January, 1897.

Q. Was he at the time of the trial of the bank stock case? A. No, sir.

Q. Did Mr. Corbett, at the time of the trial of the bank stock case, have any interest in it or represent any one interested in it?

A. He was not an attorney of record although both he and Mr. Welcome were employed by Mr. Root, and they were very much interested in the matter because of the fact that Root and the other people were interested in it. I suppose he took great interest because he was Mr. Root's attorney.

Q. Did Mr. Corbett or Mr. Welcome, or either of them, talk with you or the other attorneys in reference to the case?

A. It is so long ago, I can't remember exactly; I think probably they did with me. I don't know as to the others.

Q. Did you observe in the testimony of Mr. Frank E. Corbett, given in this case, where he stated that he con-

sidered Mr. Andrew Davis' testimony on the application for letters of administration very important and talked with you about it?

A. I believe I saw that in his testimony.

Q. And in the same connection did you observe that Mr. Corbett testified that you at that time made the remark to the effect how could you put in the testimony when your client would not allow you?

A. Yes, I saw it.

Q. You have read his testimony? A. Yes, sir.

Q. What have you to say in reference to that?

A. I think Mr. Corbett is mistaken in regard to it. I have no recollection of ever making any such statement as that.

Q. Can you recollect anything in reference to the matter you said to him?

A. No, I cannot. We probably had a good many talks about it, but I can't recall what was said.

Q. Do you remember whether or not you talked over the importance of Andrew J. Davis' testimony?

A. I presume I did. I know there were several conversations concerning the case, and I presume there was something said concerning the testimony of Andrew J. Davis.

Q. Would you or not remember, Mr. Clayberg, if you had made such a remark as that?

A. I think I would.

Q. What would you have considered it as proper to do as an honorable attorney, in a case like the bank stock case, where your client and the plaintiff was acting in a

fiduciary capacity, if he had advised or requested you to omit any testimony that was material?

A. I don't think I would have paid any attention to it; all of us insisted that Mr. Talbott's testimony was directly against us, and our instructions were to go ahead and do the best we could, in the case. I don't think we would have listened to any suggestion he might have made as to the putting in of testimony.

Q. Did he at any time give you any directions or instructions as to what testimony you should put in or leave out?

A. He never did to me. I don't think he did to anyone.

Q. In the matter of admitting this testimony of Andrew J. Davis, did you or the other counsel in the case, so far as you know, follow anybody's direction or advice, or did you act upon what you thought was best for the interest of your clients in the case?

A. I don't think anybody gave us any directions in regard to it at all. We acted according to what we believed to be the best interests of the case.

Q. When did you return to Montana—lately, Mr. Clayberg?

A. I arrived in Montana last Thursday, the first day of September.

Q. How long before that time had you been away from Montana?

A. I left Montana the latter part of June, the 20th or 21st, as I recollect it.

Q. And were not here until you returned on the 1st of this month? A. No, sir.

Q. Whereabouts were you?

A. I was in California for some three or four weeks, and since that in Oregon, near Astoria, at the Gearhart Hotel and at the Flavel Hotel.

Q. What was the cause of your leaving Montana in June?

A. In May, the 6th or 7th day of May, I was taken ill, and was confined to my bed some six weeks; as soon as I was able I went to the coast for my health; went to regain my health, if possible.

Q. And remained absent on account of your health?

A. Yes, sir.

Q. What is the condition of your health now?

A. It is very much improved.

Q. Do you have any expectation of leaving Montana shortly?

A. It entirely depends upon how my health remains. If it remains good and I find that I can do work in my office I shall remain here; if not I shall go away again.

Q. In case your health requires you to go away from Montana would you expect to leave the State?

A. Yes, sir.

Q. And go out of this district?

A. Yes, sir; I would expect to go east somewhere, possibly to the Hot Springs, Arkansas.

Q. Does your going or not depend upon the condition of your health hereafter? A. Yes, sir; entirely so.

Q. I believe you have stated in your examination that you never had any conversation yourself with Mr. Darnold? A. No, sir; I never had any talk with him.

Q. That is correct, is it? A. Yes, sir.

Q. State what you know, if you know anything, with reference to the endeavor upon the part of the plaintiff on the motion for a new trial of the bank stock case, to procure the affidavit of John B. Wellcome.

A. Mr. Wellcome was in Minnesota, as I recollect it, and he was telegraphed to make his affidavit and sent it to us that it might be filed in time for the motion for a new trial; it was made and sent on and I believe was filed a day or two after the time had expired. I am not able to say who filed the affidavit. I know if it had been sent to me and received by me in time, I would have filed it in time.

Q. But you never received it yourself?

A. No, I think not.

Q. Have you or not read the bill of complaint in this case? A. Yes, sir; I have.

Q. What have you to say, if anything, in regard to the charges in the bill of complaint, in regard to conspiracy in so far as the attorneys or parties are concerned to enable Andrew J. Davis to win the bank stock case?

A. I am only able to say in regard to the attorneys, and so far as they are concerned I am satisfied that there was no conspiracy or anything that could be distorted into conspiracy of any kind.

Q. What in regard to the parties, if you know anything.

A. I don't know anything in regard to the parties, at all.

Q. If there was any such arrangement, would or would not you have been likely to have heard of it?

A. I should think we would have heard of it; yes, sir.

Q. State, Mr. Clayberg, whether or not you, so far as you know and your associate counsel in the bank stock case, did or did not use all the means and do all the work and take all the steps you could for the success of the plaintiff, your client, in that case?

A. We certainly did.

Q. Was there anything done or omitted to be done, so far as you know, that did not tend towards the end of achieving success?

A. No, sir; everything was done by the attorneys, so far as I know, for achieving the success of the suit. I know that Mr. Toole and myself put a great deal of time upon it and considered it and discussed it very frequently.

Q. What have you to say, if anything, in reference to the charges that the attorneys for the plaintiff in the bank stock case failed to sufficiently cross-examine the witness upon the part of the defendant, particularly those who testified as to the intention of Andrew J. Davis, deceased, to give the bank stock to Andrew J. Davis, Jr.?

A. I think they were all sufficiently cross-examined. We felt at that time that any further cross-examination would simply make their testimony stronger.

Q. Were or were not you or the other attorneys for the plaintiff in the bank stock case, so far as you know, ever told or informed of any material testimony in favor of the plaintiff in said case, which you omitted or failed to produce on the trial?

A. I think not. I think we produced all the testimony we could possibly get hold of at that time. I know that the Wehrspauns, both Mr. and Mrs. Wehrspaun

after Mr. Darnold had testified in the case, were approached by a party in our interest and he informed us that they knew nothing concerning the case at all either the gift or anything about Mr. Darnold.

Q. Is there anything further, Mr. Clayberg, in regard to this matter that you desire to state?

A. I do not think of anything further. I might state that the reason we did not introduce the books of James R. Boyce & Co. was because he told us that Mr. Darnold had made entries in the books after he had been discharged, and they would not, in my opinion, have added anything to Mr. Boyce's testimony, that he worked for them until the first of March.

JOHN B. CLAYBERG.

Subscribed and sworn to before me this 14th day of September, A. D. 1898.

[Seal] HARRY HARRIS,

Notary Public in and for Lewis & Clarke County, Montana.

State of Montana,
County of Lewis and Clarke. } ss.

I, Harry Harris, a notary public in and for said Lewis and Clarke county, do hereby certify that the witness John B. Clayberg, in the foregoing deposition named, was by me duly sworn to testify the truth, the whole truth and nothing but the truth in said cause; that said deposition was taken at the time and place mentioned in the annexed notice, to wit, at my office, room 31 Bailey block, Main street, in the city of Helena, county of Lewis and Clarke, State of Montana, and on the 6th day of Septem-

ber, 1898, at the hour of 2 o'clock P. M. or that day; that said deposition was reduced to writing by me, and when completed was by the witness carefully read; and being by him corrected was by him subscribed in my presence.

I further certify that the reason for taking the foregoing deposition is, and the fact is, that the testimony of said witness is material and necessary for the defendant in the cause in caption of this deposition, made, and that the said witness contemplates going out of the District of Montana, in which district the said suit is to be tried, to a greater distance than 100 miles from the place of trial of said suit before the time of said trial.

I further certify that W. W. Dixon, Esq., appeared on behalf of the defendant and conducted the examination of the witness, and that there was no appearance on the part of the complainant.

I have retained the said deposition in my possession for the purpose of sealing up and directing the same with this certificate, of reasons aforesaid, for taking said deposition with my own hands to the Court for which the same was taken, and I do further certify that I am not counsel or attorney for either of the parties in said deposition in caption named, or in any way interested in the event of the said cause named in said caption.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office this 14th day of September, A. D. 1898.

[Seal] HARRY HARRIS,

Notary Public in and for Lewis and Clarke county, Montana.

Memorandum of Costs.

Deposition of John Clayberg, 60 folios at 20 cts. per folio	$12.00
Oath, certificate, seal, etc.	.50
	$12.50

[Endorsed]: No. 58. In the Circuit Court of the United States for the District of Montana. Harriet Wood, Complainant, vs. Andrew J. Davis et al., defendants. Deposition of John B. Clayberg. Endorsed on envelope: Filed Sept. 15, 1898, and now filed and published Dec. 5, 1898. George W. Sproule, Clerk. By Charles W. Blair, Deputy Clerk.

In the Circuit Court of the United States, for the District of Montana.

IN EQUITY.

HARRIET WOOD,
Complainant,
vs.
ANDREW J. DAVIS et al.,
Defendants.

Deposition of W. F. Sanders.

The complainant in the above-entitled suit and her attorneys are hereby notified that the defendants herein will take *de bene esse* the testimony of Wilber F. Sanders, who resides in Helena, State of Montana, for use at the

final hearing of said suit on behalf of the defendants, before Harry Harris, a notary public, within and for the county of Lewis & Clarke, State of Montana, and who is not of counsel or interested in said suit, at room No. 31, in the Bailey block, Main street, in the city of Helena, Lewis & Clarke county, Montana, on the 7th day of September, 1898, commencing at 2 o'clock P. M., on said day, and thereafter from day to day as the taking of said deposition may be adjourned, and such testimony will be so taken in accordance with sections 863, 864 and 865, U. S. R. S., and the equity rules.

Dated at Butte, Mont., Aug. 31, 1898.

(Signed) W. W. DIXON,
J. A. COTTER,
JOHN FORBIS,
WM. SCALLON,
Solicitors for Defendants.

To C. P. DRENNAN, Esq.,
Complainant's Solicitor, Main street, Butte, Mont.

State of Montana,
County of Silver Bow. } ss.

J. K. Macdonald, being duly sworn, deposes and says that he is a citizen of the United States and over the age of twenty-one years; that on the 31st day of August, 1898, he served upon C. P. Drennan, Esq., solicitor for the complainant in the case of Harriet Wood, complainant, vs. Andrew J. Davis, Jr., et al., defendants, a notice of which the foregoing is a true copy. That such service was made by personally delivering to and leaving with the said C. P. Drennan, personally, the original of said notice at his

office on North Main street, Butte, Montana. And affiant further deposes and says that he is in nowise interested in said action.

J. K. MacDONALD.

Subscribed and sworn to before me this 5th day of September, 1898.

CHAS. F. ROE,
Notary Public in and for the County of Silver Bow, State of Montana.

In the Circuit Court of the United States, for the District of Montana.

IN EQUITY.

HARRIET WOOD, Complainant, vs. ANDREW J. DAVIS et al., Defendants.	No. 58.

Be it remembered, that pursuant to the notice hereunto annexed and on the 7th day of September, in the year of our Lord one thousand eight hundred and ninety-eight, at my office, room 31, Bailey block, in the city of Helena, county of Lewis & Clarke, and State of Montana, at the hour of 2 o'clock P. M., before me, Harry Harris, a notary public in and for said county of Lewis & Clarke, duly appointed and commissioned to administer oaths, personally appeared Wilbur F. Sanders, of lawful age, who being by me first duly sworn and cautioned to tes-

tify the truth, the whole truth, and nothing but the truth, touching the matters in controversy in the above-entitled action, was then and there examined and interrogated by W. W. Dixon, Esq., one of the solicitors for the defendants, the complainant not being represented by counsel, and thereupon said witness did depose, testify, and say as appears in his answer to the interrogatories following, to wit:

Direct Examination.

(By W. W. DIXON.)

Q. What is your name and where do you reside?

A. My name is Wilbur F. Sanders; I reside at Helena, Montana; I am an attorney and counselor at law.

Q. How long have you resided at Montana?

A. I have been in Montana a resident thirty-five years, lacking possibly ten days.

Q. How long have you been engaged in the practice of law in Montana?

A. Thirty-four years and ten or eleven months.

Q. How actively have you been engaged in the practice of the law during that time, and in what courts?

A. With the exception of three and one-half years, while I was absent in Washington City, I have been continuously actively engaged practicing law in the Supreme Court of Montana, District and Probate Courts of Montana, before the justices of the peace, and in the Supreme, Circuit, and District Courts of the United States.

Q. Have you been absent from Montana during any part of this last summer? If so, state when and how long and where you were.

A. I was absent from Montana from the 28th day of May to some time in August—the exact date I cannot give—in the city of New York.

Q. Were you ill during the time, or what was the cause of your absence from the State in a general way?

A. I had a trouble, ulcer or something upon my face, and I went there to have it surgically treated; otherwise I was not ill.

Q. Was or was not that the cause of your absence?

A. That was my sole reason for going to New York, and I came back as soon as I could do so with propriety on account of that difficulty

Q. Do you expect to leave the State of Montana at any time shortly?

A. Not to be gone long, and possibly I shall not go this year, although I may be called away in the course of a month or two.

Q. If you are called away where should you expect to go? A. To New York.

Q. Please state what official positions, if any, you have held in Montana.

A. I have been a member of the House of Representatives for five terms, I think. I was a Senator from Montana in the United States senate, in 1890, 1891, 1892 and a part of 1893.

Q. Are you acquainted or have you been connected as attorney or counsel with litigation relating to and growing out of the estate of Andrew J. Davis, who died in Silver Bow county, Montana, in 1890?

A. I am acquainted with that litigation and have been connected with two phases of it.

Q. When were you first connected with it?

A. My recollection is, I was first connected with it in the contest for the probate of the will in '91 and '92. I think I was connected with that litigation as one of the counsel for the proponent of the will Mr. John A. Davis.

Q. Was that your first connection with the case?

A. It was.

Q. What subsequent connection did you have with it?

A. I was employed and engaged in the prosecution of the suit of James A. Talbott, special administrator, to recover for the estate the shares of stock of the First National Bank of Butte, from Andrew J. Davis, who claimed them as his own property; there were associated with me in that transaction, my partner, Messrs. Toole and Wallace and McConnell, Clayberg & Gunn, but only Mr. E. W. Toole, John B. Clayberg, Esq., and myself were actively engaged in the trial of the case.

Q. By whom were you employed as counsel in that case?

A. By the special administrator, Mr. James A. Talbott.

Q. Who paid your fees as counsel?

A. I think Mr. J. H. Leyson, the administrator, succeeding in the administration of the estate of Mr. Talbott.

Q. Did you assist in the trial of the case in the District Court? A. I did.

Q. And in the Supreme Court?

A. I did, possibly in the Supreme Court my assistance was in advising with my colleagues and assisting in preparing the brief, as I think I did not argue it in the court myself.

Q. Were you not connected as counsel in the proceedings in the District Court of Silver Bow county in 1890 in the matter of the application of John A. Davis to be appointed administrator of the estate of Andrew J. Davis, deceased, and the opposition thereto.

A. I was not so employed.

Q. When you were employed by Mr. Talbott as counsel in the case referred to above, and commonly called the bank stock case, what instructions or directions did he give you at that time or afterwards in regard to the conduct of the case, if any?

A. At the time he employed me, he stated to me that the case was one of great importance, and that he wished me to do everything which he could properly do to have the estate recover everything that belonged to it, and he stated to me that the other gentleman had been employed and he wished me to assist them. He said then, or at a subsequent interview, that the case was one of great delicacy or difficulty owing to certain events which had transpired in his presence touching the shares of bank stock in controversy, and for that reason he wished the estate to be well or ably represented. I can't say which phrase he used.

Q. Was your employment as counsel before or after the commencement of the bank stock suit?

A. I think it was before, but I am not certain.

Q. Did not Mr. Talbott state to you that you were employed with Mr. Toole and Mr. Clayberg in the case?

A. He did.

Q. Did you or not, after your employment, have further talk or consultation with Mr. Talbott about the case?

A. I did. Before the trial I was in Butte, and wishing to know the precise facts I went with him into the back room of the First National Bank and closed the door and had a consultation with him, lasting an hour or two, in which I cross-examined him as thoroughly as possible as to what he knew touching the transfer or gift of the shares of stock by Andrew J. Davis, senior, in his lifetime to Andrew J. Davis, Jr., and he told me the circumstances. He said that Andy, by which name the younger Davis was usually known, knew that he was cognizant of the facts, and he presumed he would be called upon by him to testify to them, and I inquired as to what he knew; what, if he were put upon the witness stand, he would swear to and also as to who else was present, if anyone, when the circumstances related transpired. I had other consultations or conversations with him on this subject matter, but on the occasion that I have described I sought to get at the bottom facts of which he was cognizant on the subject.

Q. State whether or not either Mr. Talbott or Mr. Leyson at any time told you or intimated to you that they or either of them desired to do anything, or to have you do anything whatever, that would favor Andrew J. Davis, Jr.'s, claim to the bank stock in this litigation.

A. They never did, nor did either of them.

Q. Do you know Mr. James R. Boyce, Jr.?

A. I do.

Q. Was he a witness on the trial of the bank stock case in the District Court? A. He was.

Q. For whom?

A. For the estate, for the complainant, the special administrator.

Q. Do you know whether or not he also made an affidavit afterwards that was used on the motion for a new trial in the bank stock case? A. He did.

Q. Have you read Mr. Boyce's testimony given in this suit, or the transcript of it?

A. I have read most of it, not all of it.

Q. State what you know, if anything in regard to the books of James R. Boyce & Co., which Mr. James R. Boyce, Jr., mentioned in his evidence as showing the date when William C. Darnold left his employ. State what, if anything, you have to say in regard to Mr. Boyce's testimony in this suit, relating to those books.

A. I can't say that I ever saw the books of J. R. Boyce, Jr., Co. mentioned. I remember the question as to when Mr. Darnold left the employ of J. R. Boyce, Jr., & Co. came up, but whether on the trial or on the motion for a new trial I do not remember clearly. My recollection is it appeared from some testimony that entries were made by Darnold in the Boyce books after he has ceased to be in their employ. He frequented their place of business and being familiar with it, continued to do some work on the books.

Q. State if you remember whether or not these books of J. R. Boyce, Jr., were produced upon the trial of the bank stock case in the District Court, or were referred to in Mr. Boyce's affidavit on motion for a new trial, and if they were not, if you remember the reason why they were not.

A. My recollection is that the books were not produced on the trial, and that at the time of the trial we did

not know that they contained any testimony bearing upon any controversy arising during the trial, and that if they contained anything which was of value as elucidating the facts in the trial of the case, direct or collateral, it was ascertained after the trial had closed.

Q. State if you remember how the testimony of James R. Boyce, Jr., given upon the witness stand in the bank stock case, compared with the statements he had made to yourself and other counsel before as to what he would testify to.

A. In detail, I cannot restate and contrast that which he said to us in consultations with him during the recess of the Court at the trial, and that he testified to upon the witness stand, but this I know, that his statements to us of facts which he said he knew caused the expectation that he would testify to them on the witness stand, and when he placed him upon the witness stand and examined him, he did not justify the expectations which his statements to us had caused, and upon his examination in chief and his cross-examination he did not maintain the facts which we had been led to expect that he would from conversations had with him before he went on the stand.

Q. Were you or not present when the affidavit of James R. Boyce, Jr., was taken on the motion for a new trial in the bank stock case?

A. I am not prepared to say that I was. I think perhaps I may have been; that has escaped definitely my memory. I either was present when it was taken, or saw it shortly after.

Q. State, if you can, whether or not this affidavit of

James R. Boyce, Jr., on motion for a new trial in the bank stock case did or did not include everything that he has informed you of, and which you thought material to the case at the time the affidavit was filed.

A. It did; nothing was omitted from it which we deemed material which he stated at that time that he then knew.

Q. Before or at the time of the trial of the bank stock case in the District Court, did you or not see and examine what purported to be a copy from the official transcript of the testimony of Andrew J. Davis, Jr., which had been given in 1890 in the contest over the appointment of an administrator of the Andrew J. Davis estate, and which related to what occurred at the time of the gift of the bank stock which Andrew J. Davis, Jr., claimed?

A. Yes.

Q. Did you or not also see what purported to be a transcript of the testimony of James A. Talbott given in the same matter? A. Yes.

Q. Was or was not the testimony of James A. Talbott in that matter introduced in evidence in the bank stock case or put before the Court? A. Yes.

Q. Was or was not the transcript of the testimony in relation to the gift of the bank stock to Andrew J. Davis as given by him on the contest for the appointment of an administrator introduced or put in evidence on the former trial of the bank stock case, in the District Court?

A. It was not.

Q. State, if you know, why this last mentioned testimony was not put in evidence in the bank stock case?

A. Mr. Toole, Mr. Clayberg and myself consulted as to the wisdom of introducing that as the statement of An-

drew J. Davis, Jr., we agreed that it was competent testimony, but we were of the further opinion that it was likely to be decided that he could explain those statements orally upon the witness stand if we introduced them, whereas if we did not, introduce them, he was an incompetent witness, and that there was likely to be more harm come from their introduction to the case we were trying than by omitting them, and we decided that we would not introduce them.

Q. State, if you remember, whether or not Andrew J Davis, Jr., was offered as a witness in the bank stock case in his own behalf.

A. He was; we objected to his competency and our objection was sustained, and he did not testify.

Q. So far as you know, did or did not Mr. Talbott ever request you or any of the other counsel not to introduce on the trial of the bank stock case the testimony which had been previously given by Andrew J. Davis, Jr., or did he or not, so far as you know, at any time, give you or any of the counsel any directions or instructions in regard to that testimony?

A. Mr. Talbott never to me or in my presence made any request or intimated that he did not desire that the entire testimony that we thought competent and useful be inroduced, aside from the expression of a general desire that we should try the case the best we knew how I do not think he gave us any directions. The merits of the case were in a nutshell, and involved what transpired in less than half an hour at the residence of A. J. Davis Sr., and while some other matters arose collaterally, the circumstances occurring at that time were the crucial facts of the case.

Q. Did you ever see a certain affidavit purported to have been made by one W. C. Darnold, in the matter of the bank stock case, during the pendency of the motion for a new trial in that case? A. I think I saw it.

Q. Did you know Mr. Darnold, personally?

A. I did. I have known him for twenty or twenty-five years, I should think.

Q. Please state all that you know of your own knowledge in regard to this Darnold affidavit, and what became of it, and whether or not it was used upon the motion for a new trial of the bank stock case, and if not so used why it was not used?

A. I don't know so much about that affidavit as I am advised my colleagues do. It was taken in my absence and without my knowledge, and after it was taken, it was shown to me. It was stated that it had been obtained from Mr. Darnold, upon condition that it should not be used unless there was secured to him some personal immunity from criminal prosecution, and that the word of one of our colleagues in the case had been given to Mr. Darnold to that effect, and inasmuch as it was not in our power to secure that immunity to him, and inasmuch as we had in other affidavits the fact established that he has made the same statements orally that were contained in this affidavit, it was concluded best not to introduce it. I think I ought to say another motive actuated me possibly my colleagues. Mr. Darnold's appearance upon the witness stand on the trial of the case was very much against him to those of us who had known him for some time, and as well as I did, and his affidavit did not create any surprise in me, and I did not think Judge McHatton

without his affidavit, would give much credence to his story.

Q. Do you remember being present in Corbett & Welcome's office when Mr. Boyce produced this affidavit of Darnold referred to above a few days after it had been taken in Helena?

A. I do remember to have been present when Mr. Boyce produced that affidavit. I think I was in the office while the affidavit was there and Mr. Boyce, and it was the subject matter of consideration by us, but I do not remember that Mr. Boyce produced the affidavit while I was there. I think it had already been produced and was in the possession of some of the lawyers or on the table, even that memory is somewhat vague.

Q. Have you read Mr. Frank E. Corbett's testimony in this suit as contained in the transcript of the evidence?

A. I have run my eye over it. I have not read it all.

Q. What do you know, if anything, in regard to what Mr. Corbett testifies to as to Mr. Clayberg making a remark to the effect that you did not know how you could introduce the evidence of Andrew J. Davis, Jr., in the bank stock case if your client would not let you?

A. There never was such a remark made in my presence by Mr. Clayberg or anybody else. Such a remark would have startled me because it was so contrary to all our relations with Mr. Talbott, and I am certain it would have induced me and, I am satisfied, the other counsel, to have taken steps to emancipate ourselves from any limitation of that kind.

Q. Did or did not you or your associate counsel in the bank stock case, so far as you know, or have any informa-

tion of any material testimony on the part of the plaintiff in the bank stock case which you did not introduce upon the trial of that case?

A. Speaking for myself, every item of testimony was introduced within my knowledge that I deemed material and helpful to the estate, and no circumstance occurred during the trial which lasted a week, or so inducing a belief that my colleagues omitted anything. It will sometimes occur during the progress of a trial that the trial itself will reveal testimony not foreseen which can be obtained, but my recollection of this case is that nothing of material importance was so revealed during the trial. I do remember, during the period permitted for the motion for a new trial, that we sought to get the affidavit of Mr. John B. Welcome, who was at Virginia, Madison county, Montana, if I remember right, and was daily expected to return, and when the time was limited he was telegraphed for, but I think he did not get back within the time limited and we lost his affidavit thereby. I want to say this about the whole matter; my employment was more particularly for the trial of this case. I did not prepare the pleadings or write the motion for a new trial or bill of exceptions; as to some of these, I was consulted and gave my advice, but the details of those matters were more particularly in the hands of my colleagues.

Q. Upon the motion for a new trial of the bank stock case, did you know of any matter material or any evidence material upon that motion that was not included in the affidavits which you submitted upon the motion?

A. Nothing except the Darnold affidavit; that we did not submit. The dividing line between the things ma-

terial and immaterial, useful and harmful, to be put into a motion for a new trial is one which every lawyer must judge for himself. A motion for a new trial can be materially weakened by putting in matters of no consequence. We put in everything that we deemed would assist us in reversing that judgment; getting a new trial.

Q. In your experience as a lawyer, is it or not frequently a close and serious question with counsel as to whether or not certain evidence had better be offered or left out with a view to the success of your client in the case?

A. It is; every lawyer has to determine that from his view of the materiality of the evidence and its probable influence upon the Court.

Q. State if you remember anything in relation to the examination of the witnesses for the defendant upon the trial of the bank stock case, who testified in regard to the declarations of Andrew J. Davis, that he intended to give Andy the bank, and whether or not the cross-examination of such witnesses was as close and extended as counsel thought advisable for the interest of their clients.

A. I think the cross-examination of the witnesses was as elaborate and close as was useful. It was conducted largely by Mr. Toole and Mr. Clayberg. The general standing and character of most of the witnesses was such that it was idle to cross-examine them with any view to show falsehood, and all that could be done was to get out the entire facts to see if there was any qualification to the statement to which they testified. This was true of most of the witnesses introduced by the defendant.

Q. Do you remember the testimony of Judge Knowles,

given for the defendants upon the trial of the bank stock case? A. In a general way; yes.

Q. Can you state anything in regard to whether or not counsel for plaintiff consulted as to the advisability of objecting to Judge Knowles testimony, or a portion of it, on the ground that it was a confidential communication between a client and attorney?

A. I remember there was such consultation.

Q. And what was the conclusion counsel came to in regard to it, if you remember?

A. Speaking for myself, I think I concluded that such communications might be objected to by the client, but that if they became materials in controversies thereafter between other parties that the objection being a personal one would not hold, but we did not think Judge Knowles would betray any confidence which by law or in honor he felt himself bound to maintain. I did not consider really that there was any confidence betrayed by Judge Knowles in telling this matter, and some portions of his testimony we did consider favorable to us, in fact, all through the case we maintained that the circumstances proved did not constitute a complete gift causa mortis—we agreed on that. I think I may say, as far as one man can testify to the belief of another, we all believed that and we fought it through two courts on that proposition.

Q. State whether or not, in your opinion as a lawyer, the bank stock case was what you would call a closely and hotly contested case on the part of the plaintiff.

A. It was. We used every instrumentality to win it that was at our command, and never were in any way obstructed.

Q. Do you know of anything that was done or omitted to be done in that case to enable the plaintiff to be successful in it either by the counsel in that case or by anyone connected with it?

A. I do not. It frequenly occurs in my experience that I could try a case the second time a little better.

Q. Have you read the allegations in the bill in this suit referring to the charges of conspiracy and collusion? And if you have, please state fully anything you may desire to state in relation to said charges, as to their truth or falsehood.

A. I have read the bill. Speaking for myself, the charges are wholly false. Speaking for the two gentlemen who assisted me in the trial of the case, no event occurred and nothing was omitted to excite a suspicion in my mind that there is any truth in those allegations.

Q. Have you any knowledge of any conspiracy or collusion upon the part of the defendants in this cause or any of them for the purpose of enabling Andrew J. Davis, Jr., to be successful in the bank stock case? Please state what you know. A. I have no such knowledge.

Q. Do you know any other matter or thing relevant to this case, or any part of it? If so, please state it.

A. I do not think of anything else that would be helpful to any party to this case.

W. F. SANDERS.

Subscribed and sworn to before me this thirteenth day of September, A. D. 1898.

[Seal] HARRY HARRIS,

Notary Public in and for Lewis & Clarke County, Montana.

State of Montana,
County of Lewis and Clarke. } ss.

I, Harry Harris, a notary public in and for said Lewis and Clarke county, do hereby certify that the witness, Wilber F. Sanders, in the foregoing deposition named, was by me duly sworn to testify the truth, the whole truth and nothing but the truth, in said cause; that said deposition was taken at the time and place mentioned in the annexed notice, to wit, at my office, room 31, Bailey block, Main street, in the city of Helena, county of Lewis and Clarke, and State of Montana, and on the seventh day of September, 1898, at the hour of 2 o'clock P. M. of that day; that said deposition was reduced to writing by me, and when completed was by the witness carefully read, and being by him corrected, was by him subscribed in my presence.

I further certify that the reason for taking the foregoing deposition is, and the fact is, that the testimony of said witness is material and necessary for the defendants in the cause in caption of said deposition named, and that the said witness contemplates going out of the District of Montana, in which district the said suit is to be tried, to a greater distance than one hundred miles from the place of trial of said suit, before the time of said trial.

I further certify that W. W. Dixon, Esq., appeared on behalf of the defendants and conducted the examination of the witness, and that there was no appearances on the part of the complainant.

I have retained the said deposition in my possession for the purpose of sealing up and directing the same, with

this certificate of reason aforesaid, for taking said deposition with my own hands to the Court for which the same was taken, and I do further certify that I am not counsel or attorney for either of the parties in said deposition in caption named, or in any way interested in the event of the said cause named in said caption.

In witness whereof I have hereunto subscribed my name and affixed my seal of office this fourteenth day of September, A. D. 1898.

[Seal] HARRY HARRIS,

Notary Public for Lewis and Clarke County, Montana.

Memorandum of Costs.

Deposition of Wilber F. Sanders, 45 fols., at 20c. per folio $9.00

Oath certificate, seal, etc........................ .50

Total $9.50

In the Circuit Court of the United States, for the District of Montana. Harriet Wood, Complainant, vs. Andrew J. Davis et al., Defendants. Deposition of Wilber F. Sanders. Endorsed on envelope. Filed Sept. 15, 1898; filed and published Dec. 5, 1898. Geo. W. Sproule, Clerk. By Charles W. Blair, Dep. Clerk.

United States Circuit Court, District of Montana.

IN EQUITY.

HARRIET WOOD,

Complainant,

against

ANDREW J. DAVIS, Jr., THE FIRST NATIONAL BANK OF BUTTE, MONTANA, JAMES A. TALBOTT, Formerly Special Administrator of the Estate of Andrew J. Davis, Deceased, JOHN H. LEYSON, as Administrator with the Will Annexed of Andrew J. Davis, Deceased, and JOHN E. DAVIS, as Administrator of the Estate of John A. Davis, Deceased.

Defendants.

Deposition of Harriet Wood.

Sirs: Please to take notice that the deposition de bene esse of Harriet Wood, the complainant herein, of Springfield, Massachusetts, who resides more than one hundred miles from the city of Butte, Montana, where the court at which the above-entitled cause will be tried, is to be held, will be taken to be read in evidence at the trial of the said cause on the part of the complainant, before Dexter E. Tilley, a notary public, at his office, 455 Maine street, in the city of Springfield, Massachusetts, on Saturday, the 23d day of July, 1898, at eleven o'clock in the forenoon of that day, at which time and place you are hereby notified to be present and put interrogatories to the said

witness if you shall think fit; and take further notice that the examination of said witness will be adjourned from time to time, is necessary, until said deposition is taken.

Dated, Butte, Montana, July 9, 1898.

Yours, etc.

W. S. LOGAN and
C. P. DRENNAN.
Solicitors for Complainant.

To W. W. DIXON, JOHN F. FORBIS, and JAMES W. FORBIS, Solicitors for Andrew J. Davis, Jr., and the First National Bank of Butte.

To J. W. COTTER and WILLIAM SCALLON, Solicitors for Defendant John H. Leyson, as Administrator.

To WILLIAM SCALLON, Solicitor for Defendant James A. Talbott.

To E. W. HARWOOD, Solicitor for Defendant John E. Davis, as Administrator.

Due and timely service of a copy of the foregoing notice is hereby submitted this 11th day of July, 1898.

W. W. DIXON and
FORBIS & FORBIS,

Solicitors for Defendant Andrew J. Davis, Jr., and the First National Bank of Butte.

J. W. COTTER and
WM. SCALLON,

Solicitors for Defendant John H. Leyson, as Administrator.

WM. SCALLON,
Solicitor for Defendant James A. Talbott.

E. N. HARWOOD,
Solicitor for Defendant John E. Davis, as Administrator.

United States Circuit Court, District of Montana. Harriet Wood, vs. Andrew J. Davis, Jr., et al. Notice of taking deposition De Bene Esse. W. S. Logan and C. P. Drennen, Solicitors for Complainant.

United States of America,
District of Massachusetts,
State of Massachusetts,
County of Hampden. } ss.

Be it remembered, that on this twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety-eight, I, Dexter E. Tilley, notary public within and for said county, did call and cause to be and personally appear before me at my office, 455 Main street, in said Springfield, in said District of Massachusetts, in the State aforesaid, Harriet Wood, to testify and the truth to say on the part and behalf of the complainant in a certain suit or matter of controversy now pending and undetermined in the Circuit Court of the United States for the District of Montana, at Butte, County of Silver Bow, State of Montana, in the district aforesaid, wherein said Harriet Wood is complainant and Andrew J. Davis, Jr., of the First National Bank of Butte, Montana, James A. Talbott, formerly special administrator of the estate of Andrew J. Davis, deceased, John H. Leyson, as administrator with the will annexed of Andrew J. Davis, deceased, and John E. Davis, as administrator of the estate of John A. Davis, deceased, are defendants, And said Harriet Wood being about the age of eighty-two years, and having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing

but the truth in the matter of conroversy aforesaid, I did carefully examine the said Harriet Wood, and she did thereupon depose, testify and say as follows:

Pursuant to the annexed notice the parties met at my office July 23d, at eleven o'clock in the morning. There appeared: Logan, Demond & Harby, represented by H. H. Kellogg, for complainant. Horace G. Allen, for A. J. Davis and John H. Leyson.

By consent of counsel, because of the illness of Mrs. Wood, the hearing was adjourned to 427 Union street, in said Springfield, the residence of Mrs. Wood.

TESTIMONY OF MRS. HARRIET WOOD.

(By MR. KELLOGG.)

Q. 1. What is your name, your age and your residence, Mrs. Wood?

A. Harriet Wood; I am eighty-two years old, and Springfield.

Q. 2. Where have you lived for the past eight years.

A. In Springfield.

Q. 3. What has been the condition of your health during the past eight years, Mrs. Wood?

A. It has been very poor. I have not been able to get out much of any.

Q. 4. Are you the complainant in the suit now pending in the Circuit Court of the United States for the District of Montana, which is entitled, "Harriet Wood, complainant, vs. Andrew J. Davis, Jr., the First National Bank of Butte, Montana, James A. Talbott, formerly special administrator of the estate of Andrew J. Davis,

deceased, John H. Leyson, as administrator with the will annexed of Andrew J. Davis, deceased, and John E. Davis as administrator of the estate of John A. Davis, deceased, defendants? A. Yes, sir.

Q. 5. Were you a party to the suit brought by James A. Talbott, as special administrator of the estate of Andrew J. Davis, deceased, about the year 1893 in the District Court of Montana, for the purpose of recovering nine hundred and fifty shares of the defendant bank stock claimed by Andrew J. Davis—were you a party to that suit? A. No.

Q. 6. Did you have anything to do with the suit?

A. No. Do I understand you?

(Mr. KELLOGG.) I think so.

Q. 7. Did you have any control over the suit?

(Objected to in form and substance.)

A. No.

Q. 8. When did you first know, Mrs, Wood, of the frauds set forth in the bill of complaint which you have filed in this suit in Montana, and which, it is there alleged, were consummated, and by means of which important evidence was suppressed; when did you first hear of those frauds?

A. It was in the last of September or first of October, I think it was.

Q. 9. Of what year?

A. It was two years ago.

Q. 10. So it was 1896?

A. Yes, sir; about the time we moved up here.

Q. 11. How did you learn of those frauds which you say you heard of in September or October of 1896, and which are alleged in the bill of complaint?

(Objected to in form and substance.)

A. First by the papers, and then our lawyer you know, come.

Q. 12. Who was your lawyer?

A. Why, my lawyer—why his name is gone.

Q. 13. Was it Mr. Logan?

A. Yes; his name was gone. He sat right here and he told about it and I told him I was very much distressed because I was afraid they would get in jail.

(Answer objected to as not responsive.)

Q. 14. Did Mr. Logan call on you at this house?

A. Yes; he sat in this chair and I sat in that chair (showing), when he was here.

Q. 15. Did you know anything about these frauds before the time which you speak of when Mr. Logan communicated them to you in September or October of 1896?

A. Well, you know, I said by papers, and then he came.

Cross-Examination.

(By Mr. ALLEN.)

X. Q. 16. How soon after the death of your brother, Andrew J. Davis, did you hear of his death?

A. Very soon.

X. Q. 17. Probably within a month? A. Yes.

X. Q. 18. At that time you knew that if he died without a will you were one of his heirs at law?

(Objected to in form and substance.)

A. Yes, sir.

X. Q. 19. And if he had left no will and no widow or children, do you remember what share you would have had in his estate?

(Objected to in form and substance.)

A. I don't know how much it was.

X. Q. 20. But it would be an eleventh part?

A. Yes, sir.

X. Q. 21. You didn't go to Montana yourself, Mrs. Wood, did you? A. No.

X. Q. 22. How long was it before you had employed some one, or entered into an agreement with some one to look after your interests in the estate of your brother?

A. It was soon after the death of my brother.

X. Q. 23. Whom did you first appoint your attorney to look after your interests in the estate?

A. It was my brother, Erwin.

X. Q. 24. Was that very soon after your brother Andrew J. died that you appointed your brother Erwin your attorney to look after your interests in the estate, and made agreements with him? A. Yes, sir.

X. Q. 25. And are those agreements still in force?

(Objected to as irrelevant and in form and substance.)

A. I don't know as I understand you right. I hain't changed them.

X. Q. 26. You say you have not changed them; you did not mean that you have canceled them or anything of that kind? Those agreements with Erwin?

A. I don't know as I understand you. We appointed him and he has been going on with it.

X. Q. 27. You never have canceled his authority, nor revoked it?

A. No; I don't know as I really understand you.

X. Q. 28. How soon after giving the power of attorney and making the agreements with Erwin did you begin to hear from him in reference to this estate?

A. I don't know as I understand you.

X. Q. 29. Did you see Erwin after that? And if so, how many times?

(Objected to as irrelevant.)

A. Yes; I think I did.

X. Q. 30. Did you see him here or in New York?

A. No; he would come on.

X. Q. 31. And you always saw him here?

A. Yes, sir.

X. Q. 32. About how many times have you seen him since the power of attorney and agreement was made?

A. I do not know as I can tell.

X. Q. 33. Give us your best recollection about it. Was it once a month?

A. He didn't come so often as once a month; he didn't come very often to see me.

X. Q. 34. It was about how many times, or how often, in your recollection—how many times a year, probably?

A. I don't think he come as often as once a year.

(Question objected to unless it pertains to some particular year. Asking how many times a year is entirely incompetent.)

X. Q. 35. About how often did he come a year?

A. If he come—I couldn't tell.

X. Q. 36. Don't you think you have seen him every year?

A. I think some years; I didn't see him once a year.

X. Q. 37. How many times did you see him?

(Objected to in form and substance.)

A. He didn't come very often.

X. Q. 38. Give me your best recollection as to how often—three or four times a year? Once a year?

A. I don't know. He come once—I couldn't tell.

X. Q. 39. You remember, Mrs. Wood, that from the time that Erwin was appointed your agent and attorney you have frequently heard from him about the estate; haven't you? A. Oh, yes.

X. Q. 40. About how often during that time should you say you had received letters about the estate?

A. I don't know as I understand you, but when he had any news he would write to us.

X. Q. 41. Can you tell about how often he used to write to you? A. I don't know as I could.

X. Q. 42. Can you tell me about how frequently you heard from Erwin Davis from the time he was appointed your attorney?

A. I don't know if this is any connection to the answer, but Mr. Wood was living—my husband—so he sent me money—Davis did—to support him—to help us.

X. Q. 43. I want to know about how often he wrote you letters about the estate, Mrs. Wood, after he was appointed your attorney.

(Objected to in form and substance.)

A. He didn't write unless he had some news to tell me.

X. Q. 44. You learned from Erwin Davis the fact that an alleged will had been discovered, didn't you, of your brother Andrew's?

A. I think it was through—it come out in the paper.

X. Q. 45. I want to ask you if you heard of the finding of an alleged will through Erwin Davis.

A. I think it was in the paper.

X. Q. 46. Did he communicate with you on the sub-

ject at all? About the finding of a will, or the existence of it?

A. I don't know as he—I don't know as I would really tell decidedly.

X. Q. 47. How long ago did you first employ or know of the employment for you of lawyers in connection with your interest in the estate of Andrew J. Davis?

A. I don't know as I understand you, but Erwin done it. Erwin employed the lawyer and I left it in his hands. I don't know as I understand you.

(Objected to.)

X. Q. 48. Now, I understand from you, then, that the first attorney that was employed on your behalf, so far as you know, was employed by Mr. Erwin Davis, your brother?

(Objected to. It implies that the witness has made an answer that she did not make.)

A. Yes.

X. Q. 49. And that also, as you understand it, was Mr. Logan, or Mr. Logan's firm in New York; was not it?

A. I don't know as I know of his employing any other lawyer.

X. Q. 50. Mr. Logan, you referred to? A. Yes.

X. Q. 51. Who has been spoken of here?

A. Yes

X. Q. 52. When, for the first time, did you know that Mr. Erwin Davis had employed counsel in the persons of Mr. Logan, or his firm? I don't mean exactly the day, but about how long, or how soon after you appointed Mr. Erwin Davis your attorney?

A. I don't know as I can really tell for certain.

X. Q. 53. I don't suppose you can tell to the day, but was it soon after the appointment of Erwin as your attorney that you heard of his employing Mr. Logan?

(Objected to.)

A. I don't know as I could tell.

X. Q. 54. How long have you known Mr. Logan as a lawyer in your interests—how many years? About how many years?

A. I don't know as I could tell for certain how many years.

X. Q. 55. Was not it soon after Mr. Erwin Davis was appointed that Mr. Logan was retained or first heard of by you as your attorney?

A. I think so, but I don't know as I could say for certain.

(Question objected to in form and substance.)

X. Q. 56. You have had information that Mr. Logan was acting in your interests for some years in the Davis estate, haven't you? You have known him as your attorney for some years?

A. I do not know as I understand you, but I think as much as three or four years.

X. Q. 57. Now, has not he been your attorney for much longer than that?

(Objected to on same ground.)

A. Well, I couldn't tell.

X. Q. 58. You won't say that Mr. Logan has not been your counsel for six or seven years, will you?

A. No, I cannot remember.

X. Q. 59. Did you hear from Mr. Logan after he was employed in your behalf in reference to this estate from time to time?

A. I don't know as I understand you, but I left it in his hands and the lawyer didn't have anything to do with it.

X. Q. 60. You left it in his hands—you mean Erwin's hands?

A. Yes, I did in the first place, so Erwin went on as he thought best.

X. Q. 61. Now, my question was, after you knew that Mr. Logan or his office were retained for you, whether they communicated with you on such matters about the estate, either by letter or orally.

A. I left it in Erwin's hands. They didn't communicate to me, you know, because— I don't know as I understand you.

X. Q. 62. Then, if I understand you, Mrs. Wood, you didn't hear anything from Logan or his office about this estate; is that so?

(Question objected to as too general. It should be limited.)

A. I don't know as I understand you. Erwin done the business, you know, and then if he had any news he would write.

X. Q. 63. You must understand this: Did Mr. Logan, or anyone for him, in his office, write letters to you about the estate? A. I don't remember.

X. Q. 64. Did Mr. Logan, or anyone for him, see you in reference to the estate or your interests under it, since he got through with Erwin?

A. I don't know as that is right. Yes, Mr. Logan has called since.

X. Q. 65. How many times has Mr. Logan called on you, or have you seen him personally.

A. I don't think I could tell.

X. Q. 66. Have you seen other people from his office, or connected with him in business, connected with this matter?

(Objected to as irrelevant.)

A. A lady called that worked for him a few weeks ago.

X. Q. 67. Had you ever seen Mr. Logan before the time when he called which you have spoken of two years ago in September? A. I don't recollect I had.

X. Q. 68. Can you remember any of the allegations or charges of fraud that are made in this bill in equity?

A. They are on paper, hain't they?

X. Q. 69. Yes; can you remember them?

A. What date? No.

X. Q. 70. Whether you can tell me what these charges of fraud are which you have said you knew nothing about until two years ago this September? They are set forth in the bill, and I want to know if you can tell me what they are? A. I don't know as I understand you.

X. Q. 71. On direct testimony you were asked the question in substance, when you first heard of the charges of fraud set forth in your bill in equity. Now, I want you to tell me what those charges of fraud are, if you can.

A. Do you mean them that was false against the estate?

X. Q. 72. Every charge of fraud that you can remember that is in your bill in equity?

A. I don't know as I can understand you.

Redirect Examination.

(By Mr. KELLOGG.)

R. D. Q. 73. How many agreements did you ever have with Erwin Davis—did you ever sign?

(Question objected to.)

R. D. Q. 74. The counsel for the defendants—you told him in cross-examination about certain agreements. Did you ever sign more than one agreement with Erwin Davis?

A. No, if I understand you right; I never did.

R. D. Q. 75. Was that before or after the will was discovered, Mrs. Wood, that you signed this agreement with Erwin? A. I think it was before.

R. D. Q. 76. Was there not a long period of time, perhaps some years, that you didn't hear from directly, or see your brother Erwin Davis?

(Objected to in form and substance, and as incompetent and irrelevant.)

A. I think it was not very often. I don't know as I—

R. D. Q. 77. Did you hear of any of these frauds before the fall of 1896, when you were told by Mr. Logan, as you have stated?

(Objected to as incompetent as to form and substance, and as improper upon redirect examination.)

A. I think not.

R. D. Q. 78. You don't think you saw Mr. Logan, you say, prior to three years ago?

(Objected to in form and substance.)

R. D. Q. 79. You first saw him three years ago?

A. Yes; he told us about it, after we read it in the paper.

(Question objected to as incompetent, leading, and irrelevant.)

R. D. Q. 80. How long has it been since Erwin Davis did anything for you as agent or attorney, Mrs. Wood?

(Objected to as incompetent.)

A. I couldn't tell. Mr. Logan—

R. D. Q. 81. Do you remember how long?

A. It is sometime, I guess; I can't tell how long. Well, I don't think I could tell how long.

Q. 82. Don't you remember some of these frauds, Mrs. Wood, that are alleged in your bill of complaint?

(Objected to as incompetent upon redirect examination.)

A. I don't know as I understand you, but everything has gone from me. I don't know how to answer it.

R. D. Q. 83. What some of the frauds were? What they did in the bank suit?

(Objected to.)

A. There was false witnesses going up testifying what there was not a word of truth in.

R. D. Q. 84. You have seen Mr. Logan here once, you said in your examination; have you a recollection of seeing him before 1896, when he first came up and sat in that chair as you have testified, and told you of these frauds?

A. I don't know as I recollect that I ever seen him.

R. D. Q. 85. Is Erwin Davis your attorney at present?

(Question objected to as incompetent and improper on redirect examination.)

A. I suppose our lawyer, Mr. Logan is.

R. D. Q. 86. Erwin Davis—is he, or is he not your agent or attorney now, at the present time?

A. I don't know as I understand you.

R. D. Q. 87. Did you ever hear of any frauds through Erwin Davis?

(Objected to as improper upon redirect examination.)

A. I don't know as I—through Erwin? I don't know as I ever—only by—

Recross-Examination.

(By Mr. ALLEN.)

R. X. Q. 88. You were just saying only by? You testified on redirect examination that Mr. Logan came here about two years ago in September, and told you what you had seen in the paper; had you seen it in the paper before Mr. Logan told it to you about the false witnesses?

A. Yes, sir.

Re-redirect Examination.

(By Mr. KELLOGG.)

R. R. D. Q. 89. When did you see it in the papers, Mrs. Wood? A. September, I believe.

R. R. D. Q. 90. Of 1896? A. Yes.

R. R. D. Q. 91. The same year Mr. Logan saw you?

A. Yes; a little while before he come.

HARRIET WOOD.

Commonwealth of Massachusetts, } ss.
Hampden.

Subscribed and sworn to before me this 23d day of July 1898.

[Seal] DEXTER E. TILLEY,
Notary Public.

Commonwealth of Massachusetts, } ss.
Hampden.

I, Dexter E. Tilley, notary public within and for said county, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the testimony of said witness is material and necessary for the complainant in the cause in caption of the said deposition named, and that the said witness lives, and did live at the time of taking said deposition, in the city of Springfield, county of Hampden, Massachusetts, the same being at a greater distance than one hundred miles from the city of Butte, Montana, where the court at which it is expected said cause to be tried was appointed by law to be held, viz., more than two thousand miles therefrom.

I further certify that on the twenty-third day of July, A. D. 1898, pursuant to the notice hereto annexed, I was attended at my office at 455 Main street, in said Springfield, by H. H. Kellogg for the complainant, and Horace G. Allen for the defendants A. J. Davis, Jr., and John H. Leyson, and by the consent of counsel, owing to the illness of the witness, Harriet Wood, adjourned the taking of said deposition to 427 Union street, in said Springfield, the residence of said witness, who was of sound

mind and lawful age, and the witness was by me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth. The deposition of said witness was, by consent of counsel, taken down by a disinterested stenographer in the presence of the witness, and by her reduced to writing under my authority and in my presence, and after being so reduced to writing, and after being carefully read by me to said witness, said deposition was signed by said witness in my presence.

I further certify that H. H. Kellogg, Esq., appeared in behalf of the complainant and that Horace G. Allen, Esq., appeared in behalf of said defendants.

I have retained the said deposition in my possession for the purpose of sealing up and directing the same with this certificate, of reasons aforesaid, for taking said deposition with my own hands to the Court for which the same was taken, and I do further certify that I am not counsel nor attorney for either of the parties in said deposition in caption named, or in any way interested in the event of the said cause named in said caption.

In testimony whereof, I have hereunto set my hand and seal this twenty-third day of July, A. D. 1898.

[Seal] DEXTER E. TILLEY,

Notary Public.

[Ten cent Doc. Stamp. Canceled.]

[Ten cent Documentary Stamp. Canceled.]

DEXTER E. TILLEY,

Commonwealth of Massachusetts, } ss.
Hampden. }

I, Robert O. Morris, clerk of the Supreme Judicial Court, which is a court of record for the county and commonwealth aforesaid, do certify that Dexter E. Tilley, Esq., whose signature is above written, is a notary public within and for said county, duly commissioned, and acting under the authority of this commonwealth, and that full faith and credit is, and ought to be, given to his acts and attestations, done in that capacity; and that I am acquainted with the handwriting of the said Dexter E. Tilley, and believe his signature above written is genuine; also, that his term of office commenced on the 29th day of May, A. D. 1895, and will expire of the 29th day of May, A. D. 1902. In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Springfield, this 23d day of July, A. D. 1898.

[Seal] ROBERT O. MORRIS,
Clerk.

[Endorsed]: Title of court and cause. Deposition of Harriet Wood, Dexter E. Tilley, N. P. Opened, filed and published, Sept. 22d, 1899. Geo. W. Sproule, Clerk.

Defendants' Exhibit, "United States Supreme Court Record."

(C. W. B., Special Examiner.)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

No. 517.

JOHN H. LEYSON, as Administrator, with the Will Annexed, of Andrew J. Davis, Deceased,
Plaintiff in Error,

vs.

ANDREW J. DAVIS, Jr., and THE FIRST NATIONAL BANK OF BUTTE.

In Error to the Supreme Court of the State of Montana.

Filed November 26, 1897.
(16,730.)

Filed Nov. 5, 1898.

GEO. W. SPROULE,
Clerk.

UNITED STATES OF AMERICA—ss.

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Montana, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between John H. Leyson, as administrator, with the will annexed, of Andrew J. Davis, deceased, plaintiff and appellant, and Andrew J. Davis, Jr., and the First National Bank of Butte, defendants and respondents, wherein was drawn in question the validity, of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff and appellant, as by the complaint of Henry A. Root, Sarah Maria Cummings, Ellen S. Cornue, Joshua G. Cornue, Elizabeth S. Bowdoin, and Calvin P. Davis, heirs, next of

kin, and persons interested in the estate of Andrew J. Davis, deceased, appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 29th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by:
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed] Original. Supreme Court of the United States. John H. Leyson, as administrator, with the will annexed, of Andrew J. Davis, deceased, plaintiff in error, against Andrew J. Davis, Jr., and The First National Bank of Butte, defendants in error. Writ of error. Rob-

ert G. Ingersoll, Walter S. Logan, Charles M. Demond, Henry A. Root, of counsel for plaintiff in error. Filed Nov. 4, 1897. Benj. Webster, clerk supreme court, State of Montana.

State of Montana,
County of Lewis and Clarke, } ss.
District of Montana.

I, Benjamin Webster, clerk of the Supreme Court of the State of Montana, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 328, inclusive, contain a true and complete transcript of the record and proceedings had in the said Supreme Court of Montana in the case of John H. Leyson, as administrator, with the will annexed, of Andrew J. Davis, deceased, plaintiff and appellant and plaintiff in error in said writ, vs. Andrew J. Davis, Jr., and The First National Bank of Butte, defendants and respondents, and defendants in error in said writ, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Helena, State of Montana, in the district of Montana, in the ninth circuit, this 15th day of November, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

Seal Supreme Court, State of Montana.]

BENJAMIN WEBSTER,
Clerk Supreme Court of the State of Montana.

Complainants' Exhibit, "Record of Bank Suit."

(June 21, 1898, C. W. B., Special Examiner.

In the Supreme Court of the State of Montana.

JAMES A. TALBOTT, as Special Administrator of the Estate of Andrew J. Davis, Deceased,
Plaintiff and Appellant,

vs.

ANDREW J. DAVIS, Jr., and THE FIRST NATIONAL BANK OF BUTTE, MONTANA,
Defendants and Respondents.

TRANSCRIPT ON APPEAL.

Appearances:

For appellant: McConnell, Clayberg & Gunn, Toole & Wallace, and W. F. Sanders.

For respondents: Forbis & Forbis, M. Kirkpatrick, W. W. Dixon.

Filed this 25th day of January, A. D. 1895.

BENJ. WEBSTER,
Clerk Supreme Court.

In the Supreme Court of the State of Montana.

JAMES A. TALBOTT, as Special Administrator of the Estate of Andrew J. Davis, Deceased,
Plaintiff and Appellant,

vs.

ANDREW J. DAVIS, Jr., and THE FIRST NATIONAL BANK OF BUTTE, MONTANA,
Defendants and Respondents.

Be it remembered that on the 11th day of August, 1894, a statement on motion for new trial was duly settled and signed by the Judge of the Second Judicial District of the State of Montana in and for the county of Silver Bow, that being the court in which said action was pending; which said statement was thereupon duly filed with the clerk of said court. Said statement contains all the pleadings and other papers used on the trial, together with the bills of exception duly settled and the judgment-roll. Wherefore they are not again inserted in this transcript, but may be found properly indexed in said statement. Said statement was and is in the following words and figures, to wit:

Be it remembered that on the 20th day of December, 1893, plaintiff filed his complaint herein, after which the following proceedings were had and done:

COMPLAINT.

[Title of Court and Cause.]

Now comes the plaintiff in the above-entitled action, and for cause of action against said defendants alleges:

I. That plaintiff now is and at all times hereinafter stated was the duly appointed, qualified, and acting special administrator of the estate of Andrew J. Davis, deceased.

II. That the First National Bank of Butte, Montana, one of the defendants herein, is now and at all times hereinafter stated was a national bank duly organized and existing under and by virtue of the laws of the United States.

III. That Andrew J. Davis, plaintiff's decedent, died on the 11th day of March, 1890, leaving a large estate, among which were and now are the following property, to wit, nine hundred and fifty (950) shares of the capital stock of The First National Bank of Butte, Montana, one of the said defendants, consisting of and represented by certificate No. 10, for four hundred and eighty-one (481) shares; certificate No. 14, for three hundred and forty-three (343) shares; certificate No. 22, for one hundred and sixteen (116) shares, and certificate No. 25, for ten (10) shares; that all and singular the said stock stood upon the books of said defendant, The First National Bank of Butte, in the name of said decedent at the time of his death, and yet stand on said books in his name; that each of said certificates contains the following provision, to wit: "Transferable only by him or his attorney on the books of this bank on the surrender of this certificate."

IV. That said decedent never indorsed, transferred, conveyed, or otherwise disposed of any of said stock to

any person or persons, but that at the time of his death was the sole owner of the same and the whole thereof.

V. That prior to the commencement of this suit and on the — day of December, 1893, this plaintiff presented to the officers of said defendant bank a certified copy of his letters of administration and demanded that said stock be transferred on the books of said bank to this plaintiff as special administrator of said estate, but said defendant bank refused and still refuses to make such transfer.

VI. That said decedent was not at the time of his death in any way indebted to said bank, and said bank has and claims no lien upon said stock or any part thereof.

VII. That said stock is of the value of over nine hundred and fifty thousand dollars ($950,000).

VIII. That said defendant, Andrew J. Davis, now has the certificates representing said stock in his possession or under his control, claiming some right or title thereto or some interest therein; that this plaintiff on the — day of December, 1893, presented to said Andrew J. Davis a certified copy of plaintiff's letters of administration and demanded of said defendant the delivery and surrender to this plaintiff, as such administrator, of all of said certificates, but said defendant, Andrew J. Davis, then refused and still refuses to deliver or surrender said stock or any part thereof to this plaintiff, as such administrator or otherwise.

IX. That said defendant, Andrew J. Davis, is now and at all the times hereinafter stated was the cashier and one of the directors of the defendant bank and one of the officers who had charge of the transfers of stock on the books of said bank.

X. That said defendant, Andrew J. Davis, has not such financial responsibility as equals the value of said stock.

—. That the claim of said defendant, Andrew J. Davis, to said certificates or of any interest therein is without merit or foundation in law or equity, but said claim and the possession thereof by said Andrew J. Davis casts a cloud upon the title of the plaintiff as such administrator, and prevents plaintiff from obtaining a transfer of said stock to himself as such administrator and holding the same subject to the operation of his trust.

XII*I*. That plaintiff is informed and verily believes that it — his duty as such administrator to obtain possession of said stock in specie as an asset of said estate, and hold the same as administrator, subject to the further order of the Court.

XIII. That the entire capital stock of said defendant bank consists of 1,000 shares; that said bank is an established institution with a large and increasing business, and that the dividends which will be earned on said stock and the increase in the value of said stock by the operation of said bank greatly exceed and will exceed the interest on the present value of said stock computed at the legal rate.

XIV. That plaintiff has no plain, speedy, or adequate remedy at law.

XV. This action is brought pursuant to an order of this Court made and entered on the — day of December, 1893, in the matter of the estate of Andrew J. Davis, deceased, herein pending, directing this plaintiff to institute this action.

Wherefore plaintiff prays:

1. That the claims of said Andrew J. Davis, defendant, be by this Court declared unfounded, void, and of no avail.

2. That said defendant, Andrew J. Davis, be, by decree of this Court, compelled to deliver and surrender to this plaintiff, as administrator, all of said certificates of stock.

3. That said defendant, The First National Bank of Butte, Montana, be, by decree of this Court, commanded to transfer said stock to this plaintiff, as administrator, upon the books of said bank, and to issue and deliver to said plaintiff as such administrator new certificates representing said stock.

4. For costs of suit.

TOOLE & WALLACE,
McCONNELL, CLAYBERG & GUNN,
Attorneys for Plaintiff.

Filed Dec. 20, 1893.

[Title of Court and Cause.]

SUMMONS.

The State of Montana sends greeting to Andrew J. Davis and The First National Bank of Butte, Montana, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the District Court of the Second Judicial District of the State of Montana in and for the county of Silver Bow, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this

county, but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought by the said plaintiff as special administrator of the estate of Andrew J. Davis, deceased, to recover judgment of the said Andrew J. Davis for the possession of nine hundred and fifty (950) shares of the capital stock of The First National Bank of Butte, Montana, one of said defendants, consisting of and represented by certificate No. ten (10) for four hundred and eighty-one (481) shares, certificate number fourteen (14) for three hundred and forty-three (343) shares of said stock, certificate numbered twenty-two (22) for one hundred and sixteen (116) shares of said stock, and certificate number twenty-five (25) for ten (10) shares of said stock, all of which stood upon the books of said bank in the name of said decedent at the time of his death, and which was the property of said decedent at the time of his death, and of which he was at that time the sole owner, and which said stock is of the value of nine hundred and fifty thousand ($950,000.00) dollars, certificates of which said stock is now in the possession or under the control of the said defendant, Andrew J. Davis, and which he refuses to deliver, although demanded so to do, and which is claimed by the said defendant, Andrew J. Davis, and which said claim is without any foundation in law or equity, and also for a judgment of the Court decreeing and demanding the said defendant, The First National Bank of Butte, to transfer said stock to plaintiff as such special administrator upon the books of said bank, and to issue and deliver to said plaintiff as such special administrator new

certificates representing said stock, and which it has heretofore been demanded to do, and for costs of suit.

And you are hereby notified that if you fail to appear and answer said complaint, as above required, the said plaintiff will apply to the Court for the relief prayed for in the complaint.

Given under my hand and the seal of the District Court of the Second Judicial District of the State of Montana this 20th day of December, in the year of our Lord one thousand eight hundred and ninety-three.

[Seal of Court] H. A. NEIDENHOFEN,

Clerk.

By James F. Wilkins,

Deputy Clerk.

Office of the Sheriff of
Silver Bow County, Montana.

I hereby certify that I received the within summons on the 20th day of December, A. D. 1893, and personally served the same on the 20th day of December, A. D. 1893, by exhibiting the original and delivering a true copy thereof to Andrew J. Davis personally and Andrew J. Davis, he being cashier of The First National Bank of Butte City, Montana, in the county of Silver Bow, Montana, they being the defendants named in said summons.

Dated this 22d day of December, A. D. 1893.

Sheriff's Costs.

Service	$1.00
Copies	1.60
Mileage	.40
	$3.00

Paid.

SAMUEL J. REYNOLDS,
Sheriff.
By Frank Geary,
Deputy Sheriff.

Filed December 22d, 1893.

[Title of Court and Cause.]

ANSWER OF ANDREW J. DAVIS.

Now comes the defendant Andrew J. Davis and for his separate answer to the complaint of plaintiff herein—

Denies that the shares of the capital stock of The First National Bank of Butte, Montana, described in the complaint, or any of them, or represented by the certificates mentioned in the complaint or any other certificates, were or are the property or any portion of the estate of Andrew J. Davis, deceased, left by him at his death.

This defendant denies that said Andrew J. Davis, deceased, never transferred or conveyed or otherwise disposed of any of the said stock of the said First National Bank of Butte described in the complaint to any person or persons, and denies that at the time of his death he was the sole or any owner of said stock or the whole or any

part thereof, but avers that at the time of the death of said Andrew J. Davis this defendant was and ever since has been the owner of all of the stock and the shares thereof and the certificates representing the same described in the complaint and in possession thereof, as hereinafter more particularly stated.

This defendant admits that he is now and for several years last past has been the cashier of The First National Bank of Butte, but denies that he is now or has been at any time since shortly after the death of said Andrew J. Davis a director of said bank.

This defendant denies that his claim to the shares and stock and the certificates thereof described in the complaint is without merit or foundation in law or equity, or that said claim or the possession of said stock or certificates by this defendant casts any cloud upon any title of plaintiff thereto, and avers that plaintiff has no title or right thereto, but that this defendant is in law and equity the owner thereof.

This defendant, further answering, avers that he was a nephew of the said Andrew J. Davis, deceased, and had been cashier of said First National Bank for several years before the death of said Andrew J. Davis, and for some time before said death this defendant had managed and attended to all the business of said bank; that in the latter part of the month of December, 1889, the said Andrew J. Davis was and had been for some months seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died; that he was then about seventy years of age, and was preparing to travel to the Pacific coast for his health; that thereupon, on the

twenty-seventh or twenty-eighth day of December, 1889, at Butte City, in the county of Silver Bow, and State of Montana, the said Andrew J. Davis, being seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died, but being of sound and disposing mind and in view and in apprehension and expectation of his death from said disease or ailment or otherwise, gave to this defendant, as a gift, the shares and stocks and the certificates thereof of the said First National Bank of Butte, which are described in the complaint, and at the same time delivered said certificates of stock to this defendant as a gift, and this defendant then and there received and accepted the same; that thereafter, on the 11th day of March, 1890, at Butte City, Montana, the said Andrew J. Davis died from the same disease and ailment from which he was suffering at the time he made the gift and delivery of said stock and certificates thereof to this defendant, as above stated, and that this defendant has ever since said gift and delivery retained and held in his possession and claimed as his own and does now so hold in his possession and claim as his own all of the said shares of stock and the certificates thereof described in the complaint, and is now the owner thereof and entitled to have the same transferred to him upon the books of the said bank; but the said bank and the directors thereof have heretofore refused and now refuse to permit said stock and shares to be transferred on the books of said bank to this defendant or the plaintiff herein until the rights of the parties to said stock and shares are settled and determined by the Court.

Defendant, having fully answered, asks that plaintiff take nothing by his complaint herein, and that by decree of this Court this defendant be decreed and adjudged to be the owner of each and all of the shares of stock and the certificates thereof of the said First National Bank of Butte which are described in the complaint and entitled to have the same transferred to him on the books of said bank; that it be also adjudged that plaintiff, as special administrator of said estate of Andrew J. Davis, deceased, or otherwise, has not, nor has said estate any right, title, or claim to said shares, stock, and certificates thereof or any part thereof; that the defendant bank herein be ordered to transfer said shares and stock to this defendant and issue to him new and proper certificates therefor, and that this defendant have any further and equitable relief in the premises that may be necessary and proper, and that he recover of plaintiff or of the estate he represents his, defendant's costs of this action.

M. KIRKPATRICK,
FORBIS & FORBIS, and
W. W. DIXON,
Attorneys for Defendant Andrew J. Davis.

Duly verified.

Filed January 6th, 1894.

[Title of Court and Cause.]

ANSWER OF FIRST NATIONAL BANK.

Now comes The First National Bank of Butte, Montana, one of the defendants in the above-entitled action, and for its separate answer to the complaint of plaintiff herein states that as to whether or not the shares of the

capital stock of this defendant described in the complaint were or are the property or a portion of the estate of the said Andrew J. Davis, deceased, left by him at the time of his death, or as to whether or not said decedent never indorsed or transferred or conveyed or otherwise disposed of any of said stock to any person or persons, or as to whether or not he was the sole owner of the same and the whole thereof, or as to whether or not the claim of the defendant Andrew J. Davis herein to said certificates or of any interest therein is without merit or foundation in law or equity, or as to whether or not said claim and the possession thereof by said Andrew J. Davis casts a cloud upon any title of plaintiff, as administrator or otherwise, this defendant bank is not advised, but insists upon proof thereof, so far as may be necessary to protect the rights of this defendant in this action.

This defendant, further answering, states that defendant Andrew J. Davis is now and has been for several years last past the cashier of this defendant bank, but denies that he is now or has been at any time since shortly after the death of said Andrew J. Davis, deceased, one of the directors of this defendant.

This defendant, further answering, avers that it has no interest in this controversy further than to protect itself; that it has heretofore refused and now refuses to make any transfer on its books of the shares and certificates of stock described in the complaint, although requested by both plaintiff and defendant Andrew J. Davis so to do, but that this defendant is ready and willing to make such transfer whenever it can do so with safety to itself, to whoever the Court may hold, upon final decision of this

body's orders but your own, which may only effect subsequent business of your own, and that if you will deal with me personally, and with nobody else, I will religiously carry out every stipulation in this instrument.

I am very serious in this thing, and want you to know that I have positive assurance that if I rescind my testimony, even to the verge of perjury, that I will be fully protected to any amount. I do not do this in the form of a threat, but, only as a reasonable consideration for what I know I have done for you.

Candidly consider this without bias, weigh every point in the case. I place myself in jeopardy in doing this, yet I do it with my eyes open. No other consideration except the above stated will go. Give me a hearing at John Davis's store to-morrow at 2 o'clock P. M. as that is the extreme limit that I have from other sources.

Copy. Yours truly,

The next exhibit in regular order is letter of Feby. 19, 1890, shown at page 262 of this record and is not here repeated.

Complainant's Exhibit, "Darnold Affidavit."

(No. 58. Harriet Wood et al. vs. A. J. Davis et al. Darnold Affidavit. Dated July 12, 1894. June 21, 1898. C. W. B., Spl. Examiner. Endorsed: McConnell, Clayberg & Gunn, Attorneys, Helena, Montana.)

In the District Court of the —— Judical District, in and for the County of Silver Bow, State of Montana.

JAMES TALBOTT, Special Administrator of the Estate of A. J. Davis, Senior, Deceased,

vs.

A. J. DAVIS, Junior, and the First National Bank of Butte.

State of Montana,
Lewis & Clarke County, } ss.

Personally appeared before the undersigned, a notary public in and for said county and State, William C. Darnold, and made oath in due form of law that he is the same William C. Darnold who testified in behalf of the defendants in the above-entitled cause upon the trial of same in the District Court of Silver Bow county; that for several months before he did so testify, he had been drinking, and had at times taken chloral, when suffering from nervous prostration; that he was out of employment and des-

titute, and had been for sometime, and was much depressed in mind; that while in this morbid condition of mind, he delivered the testimony given upon said trial.

Affiant further states that said testimony was not true; that he had no such conversation as detailed in said testimony with A. J. Davis, Senior, Deceased, but that he did have a conversation with said A. J. Davis, Senior, deceased, about the latter part of August, 1886, at which time he was engaged as bookkeeper in the First National Bank of Butte, and had had some trouble with his books with the defendant, A. J. Davis, Junior, and in the conversation that he had about the last of August, 1886, with A. J. Davis, senior, he complained to him of the treatment of said defendant, A. J. Davis, junior, when the said deceased said to him that he had better go back to work, as Andy (referring to A. J. Davis, Junior) would eventually own the bank; that this was the only conversation he had with said Deceased in regard to the defendant, A. J. Davis, Junior, owning the bank; that all he stated upon the witness stand in reference to the conversation had with said Deceased shortly before he died, stating to him in substance that he had given the stock of the defendant, the First National Bank, to the defendant, A. J. Davis, Junior, is not true; that the said Deceased at said time and place, nor at any other time and place, made any such statement to him.

Affiant further states that, while no one had offered him any consideration, or made him any promises to induce him to give the above testimony, he was led to believe, while in the morbid condition of mind above referred to, that he would be liberally rewarded by the

defendants for so great a favor as giving the testimony which he did give would be.

Affiant further states that an hour or so after he had testified, one Myer Ganzberger, a resident of the city of Butte, with whom affiant was well acquainted, came to him on the street and asked him if he did not wish to take a drive to Gregson's Springs, situated about 18 miles from Butte City; that affiant agreed to go with said Ganzberger to said springs, and they went to a livery stable and procured horses and buggy and drove to said Gregson's Springs; that while affiant and said Ganzberger were at said Springs, said Ganzberger made arrangements with the proprietor thereof for affiant to return and spend some days at said springs, and that affiant did so return and remain there from Saturday until the following Thursday; that on Tuesday of the same week, said Ganzberger came to said Springs and proposed to affiant to go to California, but affiant said that he had been to California, but, if he was allowed to choose, he would prefer to go to his old home in Piqua, Ohio, and this was agreed to by said Ganzberger.

Affiant further states that, according to this agreement, he was taken by said Ganzberger to Piqua, Ohio, where affiant remained some two and a half weeks, but said Ganzberger went to Washington, D. C., or left affiant for the avowed purpose of going to said Washington City, and aterwards affiant received a telegram from said Ganzberger to meet him in Cincinnati, which affiant did, and they returned to Butte City, arriving there some ten or twelve days ago.

Q. How well were you acquainted with him and was your acquaintance with him intimate or not?

A. Well, I was very intimately acquainted with him for the last eighteen or twenty years.

Q. Were you or not connected with Judge Davis in business at any time? A. I was; yes, sir.

Q. If so, when and how long?

A. I was connected with him in mining and milling I think about seven or eight years before he died. Well, it was twelve years before he died, I guess; very near.

Q. What kind of business? A. Mining.

Q. At the time of his death what position, if any, did Judge Davis hold in the First National Bank of Butte?

A. President.

Q. Do you know Andrew J. Davis, one of the defendants in this action—frequently called Andy Davis, and whom in my questions to you hereafter I will designate as Andy Davis to distinguish him from Judge Davis?

A. Yes, sir; I know him.

Q. How long have you been acquainted with Andy Davis?

A. Well, I think I must have been acquainted with him about twelve years or it might be a little more.

Q. Did you or not know him before he came to Montana? A. No, I didn't.

Q. How well and how intimately have you known him?

A. Well, I have known him very intimately for, say, eight or nine years.

Q. What is his business?

A. He is cashier now of the First National Bank of Butte.

Q. How long has he been cashier?

A. I guess he has been cashier about three years, probably, or a little over—three or four years.

Q. Before he was cashier how long had he been employed in the bank, if you know?

A. Well, I think ever since he came to the State, and that would be about twelve years, probably, I should think, I couldn't say positively about that.

Q. You are not exact about these matters?

A. No; I am not exact about these matters. I never paid any attention to it.

Q. State, if you know, who managed the business or affairs of that bank for the last two years or thereabouts before Judge Davis death. A. Andy Davis.

Q. What relation, if any, was Andy Davis to Judge Davis? A. Nephew, as I understood.

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for him; if so, when and what did Judge Davis say?

Mr. TOOLE.—Objected to as incompetent and immaterial.

Mr. KIRKPATRICK.—We might as well settle that question now, as we propose to introduce evidence as to the relations existing between the parties, the donor and donee, the feelings of affection and confidence, and the whole relation that existed between them; also to show by prior declarations of the donor, Judge Davis, that he intended to make a gift of this stock to the defendant,

the donee. We think that the law is clear upon this proposition.

Mr. TOOLE.—We object to the question more particularly because it is as to his business capacity, which, we think, has no bearing upon the matter of the gift at all.

(Objection overruled. Plaintiff excepts.)

A. As to his business qualifications, the Judge thought there was nobody like him. Pertaining to the bank and so on he always thought he couldn't place anybody like him.

Q. Go on and answer the question in your own way. Of course, it is part of the question when and where you heard Judge Davis say anything with reference to Andy Davis' business capacity and character or as to his affection or liking for him.

A. Well, he always spoke of him as a good business man and just the man he wanted there and had to have, and that he was lucky to have him there. As to the time, I couldn't give any time, because he spoke that to me many a different time.

Q. During what years, can you say?

A. Well, I can say the last year of his life. I know he talked to me in 1889.

Q. More than once?

A. Yes; I think a great many different times.

Q. When and what, if anything, did he say in reference to his affection or liking for Andy?

A. Well, he always spoke to me of him as a father would of his son. He felt that way, apparently, from his talk to me; he felt proud of him.

Q. Was that only on one occasion or frequently?

A. Frequently, sir; frequently.

Q. Did you at any time before the 27th or 28th of December, 1889, hear Judge Davis say anything as to what disposition he intended to make of the First National Bank of Butte, or his stock in it, in case of his death? If so, when, and what did he say?

Mr. TOOLE.—We object to that upon the same ground as heretofore—that it is incompetent and inadmissible for the reason that the validity of this gift depends exclusively upon what transpired and was said at the time it was made.

(Objection overruled. Plaintiff excepts.)

Q. State if you ever heard him say anything about it, and, as near as you can, when it was and what he said.

A. Well, it was about that time—the 27th or 28th—that he gave that stock to Andy.

Q. Well, this question relates to before that time.

A. Well, I heard him say that he never intended the bank to go in his estate; that he had always intended that for Andy, and that was what he expected to do with it.

Q. Can you say when that was?

A. Well, that was, I think, after the fire at the bank, as near as I can recollect, and that was in September, 1889. When he talked to me about that I think it was across the street, when he moved across after the fire.

Q. Did you hear him say that on more than one occasion?

A. Yes, sir; I heard him say it more than once; different times.

Q. Did you see Judge Davis about the 27th or 28th of December, '89? A. Yes, sir.

Q. Where did you see him?

A. I saw him at his residence in Butte, East Broadway; that was about the 27th of December, '89.

Q. Were you present at that time at any conversation that occurred between Judge Davis and Andy Davis relating to certain stocks or shares in the First National Bank of Butte, owned by Judge Davis?

A. Yes, sir; I was.

Q. Give, as nearly as you can, the day of the month and the year when this conversation took place.

A. Well, it must have been between the 27th and 29th of the month that that thing transpired.

Q. What year? A. 1889—December, 1889.

Q. You can't give the date any more definitely?

A. No; I can't make it any closer than that because I had some papers signed on the 27th of the month, I had some deeds, and that is the only way I can get back to that time, but when this thing came up I didn't know just when it was.

Q. You don't know just how long it was before he went away?

A. It was not more than a few days. He went away before New Year's.

Q. But you can't say the exact date?

A. I can't say the exact date; no, sir.

Q. It was between the 27th and the 29th?

A. Yes, sir.

Q. What time of day was it when this occurred?

A. It was in the evening.

Q. After dark? A. Yes, sir.

Q. Who was present at that conversation?

A. Andy Davis and Judge Davis and myself.

Q. Any one else that you remember of?

A. They couldn't have been any one else that I know of that came from the outside. There might have been somebody in the house that lived there with him, Mr. Wehrspaun's family, but I couldn't say that anybody was in there.

Q. You don't remember?

A. I don't remember anybody else.

Q. How did you come to go to Judge Davis' house on that occasion?

A. Well, he had been for seven or eight days there settling, he and I, and Andy was with us all the time, and whether we wound up everything on the 27th or not, as to our business, I don't recollect positive on that, but that was the night that he signed this deed.

Q. What deed?

A. A deed to some property that he deeded to me.

Q. When you went to Judge Davis' house that evening, who was there besides him?

A. There was not anybody.

Q. Who came there afterwards, if anybody?

A. Andy came in.

Q. When Andy came, did he bring anything with him that you remember of?

A. Yes, sir; he fetched a box there with him, an iron or tin box, as it might be called.

Q. What kind of a box?

A. Iron or tin; I don't know what you might call it; it was painted.

Q. Do you know whose box that was?

A. It belonged to the Judge.

Q. Had you seen it before that time?

A. Yes, sir.

Q. Do you know where it was generally kept?

A. It was kept in the vault at the bank.

Q. Do you know what it contained, in a general way?

A. Well, I didn't know particularly what it contained until that night.

Q. Do you know who kept the key of that box?

A. Well, he had it—Judge Davis had it himself.

Q. At the time of this conversation, what was the condition of Judge Davis' health?

A. His health was poor.

Q. How long, if you know, had he been sick or in poor health?

A. Well, I think he had not been in good health—well, he had been four or five or six months in very bad health.

Q. Four or five or six months before this?

A. Before this; yes, sir. Worse than common, you know. He had not been well for a year or more.

Q. State what, if anything, you ever heard Judge Davis say prior to the time of this conversation as to his expectation of recovering his health.

Mr. TOOLE.—We object, as it is a declaration prior to the time of the gift that is called for touching his health at that time.

Mr. DIXON.—We expect to follow that up by showing

what his expectation as to recovering or not was at the very time of this gift.

(Objection overruled. Plaintiff excepts.

A. Well, he often said to me that he didn't never expect to recover from it; that he was too old to get over it; couldn't overcome the disease.

Q. Did he say that to you on more than one occasion?

A. Oh, yes; he spoke to me about that many a time. I would take him sometimes in the buggy and ride him up on the hill, and he would say that he was too old to handle this disease that he had, you know.

Q. How old was he at that time; do you know?

A. Well, he was about seventy when he died, and that was a year before. I think he was right close to seventy, if I recollect right. I recollect seeing the date of his age at that time, and I think it was close to seventy; maybe a month or two over or under. I have forgotten exactly about that.

Q. At the time of this conversation what was the condition of Judge Davis as to his soundness of mind and capacity to transact business?

A. Well, I think he could transact business as good as he ever could in his life, as far as I know, indeed, or ever seen him. I had quite a settlement with him, and I don't think that he overlooked anything.

Q. Did he transact on that day or the day before any other business outside of that relating to the bank, that you know of?

A. Well, I had business with him right up to this time. You say the day before?

Q. Yes.

A. Well, he did transact business with me, but I don't know of anybody else.

Q. What did this business relate to?

A. Well, it was a settlement of money that I owed him on the sale of the mines.

Q. A settlement of accounts between you and him?

A. Yes, sir; between me and him.

Q. Did that extend over a considerable period of time?

A. Well, I think it was about seven years and seven or eight months that this account had been running.

Q. It included many different matters?

A. Yes, sir; many different matters; and it covered considerable money.

Q. That was all settled up between you and him, was it? A. Yes, sir; all settled up.

Q. Did you say that was the same day or the day before?

A. Well, it might have been the day before that we settled everything up. When the deed was signed it might have been on the 27th, which would make it on the 27th or the 29th or some time.

Q. Was the deed signed on the same day of the conversation?

A. Well, I couldn't say positive whether it was the same day the deed was signed or not.

Q. I am not sure that you answered the question I asked you with reference to the condition of Judge Davis as to his soundness of mind. At the time of this conversation how did he appear and act?

A. Why, his mind was all right as far as I could see.

I couldn't think anything else but that his mind was perfectly sound. From the business that I transacted with him I couldn't think anything else. He might be a little tired; it had taken a little long, and he might be a little tired, and that was the reason it took so long. We wouldn't be there more than three or four hours in the evening, and then we would let him have a rest, and he would get tired and we said we would let it go till next day. He would get a little tired, but he was all right.

Q. How long had that been going on?

A. Seven or eight days.

Q. And during that time he would talk about your business affairs every day? A. Yes, sir.

Q And matters were finally concluded between you there the day before or the same day that this conversation took place?

A. Yes, sir; the 27th, I believe, is the day that we wound up our business, and this other thing might have come the next day, for all I know; I don't know about that.

Q. It was that day or the next? A. Yes, sir.

Q. Now, Mr. Talbott, I want you to state as fully and as precisely as you can all that was said and done and that occurred at this conversation between Judge Davis, Andy Davis, and yourself between the 27th and 29th days of December, 1889, and which you have referred to. I would like you to go on and state everything that was said and done by everybody there as nearly as you can.

A. Well, he ordered the box fetched down the day before. Now, that might have been the 27th that he or-

dered the box. He said, "When you come down to-morrow fetch my box down," and he told me to come down, too. I came down ahead of Andy and was there in the room and Andy came down later on, and the Judge was down below in the kitchen or down in the dining-room below, and he came up after Andy came. I am not sure whether Andy went down after him or not, but anyway he came up, and then he wanted to look at these papers in the box, and he unlocked the box and pulled the papers out on the table.

Q. That is, the Judge did?

A. Yes, sir, and looked around them awhile and finally said, "Where is all of this? this isn't all; there is something that is not here," he says, and it appeared that he got them all pulled out together and did not get them all. Andy told him he guessed they were all there and he pulled the papers over and looked at them and found the missing papers and figured up and said they were all there.

Q. Who did that? A. Andy did.

Q. What stock was this?

A. It was the stock of the First National Bank of Butte. Andy figured it up and told him, "That is all; it is all here." "Well, now," he says, "there is fifty shares in the directors' hands." Then he commenced going over the directors, and he came down to Hauser, and it appeared as if Hauser had nothing there; he had nothing there to represent from Hauser.

Q. What do you mean?

A. Nothing to show how Hauser held that stock. So he said to Andy, "You write to Hauser and see that he

signs a contract, and do it right away," he says. Then the stock was all right; they understood then that there was nine hundred and fifty shares. Andy counted it up. There were 950 outside of what the directors had. Andy passed them over to the Judge after he figured up and showed him what there was of it, and he passed it back again, and he said, "I have always intended that for you; you take that."

Q. The Judge passed it back to Andy?

A. Passed it back to Andy; yes, sir.

Q. After Andy had figured it up and handed it to the Judge? A. Yes, sir.

Q. And said what?

A. He said, "I have always intended that for you," he says, "and I want you to take it."

Q. Well, what did Andy do?

A. Well, Andy took it, and I sat there, and it was a kind of a surprise to me. I didn't expect anything of that kind. I didn't know what he did. I supposed he had his business or maybe would fix his business in a different way, but he did that and he said, "I always intended to do that, and now I will do it." Andy picked up the stock and we commenced talking to him and telling him that we didn't think that he was so ill.

Q. What did Andy do with this stock?

A. He put it in his pocket. We told him we didn't think he was so seriously ill as he might think. "Well," he says, "I am an old man," he says, "and there is no telling. I can't stand what I used to. I don't think I can ever get over this disease," he says; "I can't stand it; I am too old; I can't expect it."

Q. State, as near as you can, just what he did say in reference to his expectation of recovering or not.

A. Well, he just said that he didn't expect he could. He said we might think it, but, he says, "I don't. I only hope it will be so, but I don't think it."

Q. What did you or Andy say to him?

A. Well, we told him that we thought he would if he would go down there and give his business up and not be bothering about it; we thought he might improve.

Q. What do you say that he thought about it?

A. Well, he said he didn't think it. He said he was going to try it, anyway. He said, "I will get ready and go in the morning," and I think he went the next day after that.

Q. I believe you stated after Judge Davis gave Andy this stock what Andy did with it.

A. Yes, sir; he put it in his pocket.

Q. After the stock was given to Andy what was done with the box?

A. Andy fetched the box back to the bank.

Q. What was done with the key, do you remember?

A. I couldn't say.

Q. You don't remember who kept the key?

A. No; I couldn't say.

Q. How many certificates of stock were there—that is, how many pieces of paper? A. Four pieces.

Q. If I understood you correctly, you said that Andy figured up this stock? A. Yes, sir.

Q. There were four certificates, you said?

A. Yes, sir.

Q. When Andy figured up the certificates of stock did he or not have them in his hand?

A. Andy had them in his hand; yes, sir; at that time when he figured them up.

Q. When he figured them up what did he do with them? A. He handed them back to the Judge.

Q. What did the Judge do with them?

A. He handed them over to Andy.

Q. Were they the same certificates?

A. Yes, sir.

Q. State whether or not you ever saw those certificates of stock afterwards. A. No, sir; I never have.

Q. After that conversation, you mean?

A. Yes, sir.

Q. Did you or not ever have those certificates in your possession as special administrator?

A. No, sir.

Q. Or otherwise? A. No, sir.

Q. State, if you know, how soon, if at all, after Judge Davis gave Andy these certificates of stock, as you have testified, Judge Davis left Butte.

A. Well, I think he left the next morning; that is my opinion.

Q. Where did he go?

A. Well, he started to go to the sound and stopped at Tacoma. I believe that is where he stopped at.

Q. State, if you know, from Judge Davis' declarations or otherwise, why he left Butte after that conversation.

Mr. SANDERS.—Objected to; incompetent and hearsay testimony; not touching any proposition upon which

hearsay testimony is admissible; not a part of the res gestae.

(Objection overruled. Plaintiff excepts.)

A. He went, so he said, to see if he could not improve his health.

Q. Who went with him, if you know?

A. John A. Davis, his brother.

Q. State, if you know, when he returned to Butte.

A. Well, that I couldn't say—the time he returned, how long he was gone, or anything of that kind.

Q. State, if you know, who came back with him.

A. Andy came back with him.

Q. What has become of John J. Davis, if you know?

A. He is dead.

Q. After Judge Davis returned to Butte, where did he remain until his death?

A. At his residence, in Butte.

Q. State whether or not you saw him soon after his return to Butte?

A. I saw him the morning that he came back, the same morning.

Q. When he returned to Butte, what was the condition of his health and strength as compared with what it was when he left Butte?

A. It was worse. He was worse off when he came back than he was when he went away.

Q. A little worse or a good deal worse?

A. Oh, considerably worse.

Q. From the time of his return to Butte, how frequently did you see him up to the time of his death?

A. I think every day.

Q. After his return to Butte and up to the time of his death, what was his condition as to health or improvement in health?

A. He went down all the time from the time he came back.

Q. Do you know how long it was after he came back before he died?

A No; I don't because I can't place the time that he was gone down there.

Q. Can't place how long it was?

A. No; I couldn't place it.

Q. Well, you have some idea about it, haven't you?

A. Well, I should think that it was probably three weeks or maybe four before he died after he came back.

Cross-Examination.

(By Mr. TOOLE.)

Q. How long did you say you had known Judge Davis before his death? A. I think I knew him since '64.

Q. What were your personal relations with him?

A. Back in early times?

Q. Yes, sir; that is what I mean.

A. Well, I had at one time—about the only business I ever had with him was I bought some liquor from him.

Q. Well, personally, friendly or otherwise?

A. Oh, friendly, certainly. I thought you meant in a business way.

Q. What were your business relations with him prior to his death?

A. Well, I never had anything, as I told you, outside

of buying that liquor from him, and then afterwards we were in partnership here in mining ventures.

Q. How long have you known Andrew J. Davis, Junior, the defendant here?

A. I have known him ever since he came here, and I think it must be ten or twelve years.

Q. What official position does he hold in the First National Bank, if any?

A. He is there now as cashier.

Q. What official position, if any, do you hold in the bank? A. Vice-president.

Q. How long have you held that official position?

A. I think it is about three years.

Q. It has been since the Judge's death?

A. Yes, sir. I was a director before.

Q. How long has Andy held the position of cashier of the bank?

A. He held it before the Judge died. I don't know whether he was cashier or assistant cashier at that time; it was one or the other.

Q. You spoke of Judge Davis being president of the bank. A. Yes, sir.

Q. How long was he president of the bank?

A. From its organization.

Q. Up till what time? A. Till his death.

Q. Did he not hold also the office of director of the bank in connection with that of president?

A. I don't think that he did hold office as director; I am not sure. I don't know exactly, but the books will show that.

Q. What have been your personal relations with Andy since you have known him?

A. They have been good all the time.

Q. Friendly? A. Yes, sir.

Q. What have been your business relations with him since you have known him?

A. I have had no business personal relations with him in any way.

Q. Have you been interested with him in any investments or anything of that sort lately?

A. Well, we have been interested in some little purchases, like the purchase of a mine, or locating it, or patenting it, or something like that.

Q. Well, you are partners in some mines in operation, aren't you? A. No, sir.

Q. You mean that you are not operating the mine?

A. No, we are not operating it; but we own some like that together, jointly.

Q. How long have you been partners or joint owners in these mining properties?

A. I don't think it is over four years, probably. The records will show that, where we are interested together. I should say something like that that, though.

Q. Who has had charge and control of the business of the bank since the death of Judge Davis?

A. Well, I suppose he has had charge of it as cashier, and the directors have acted with him, like what we should do and what should be done, and so on, and advised with him in regard to such things as that.

Q. Who has? A. The directors of the bank.

Q. Have you not what is known as an examining committee or anything of that sort—a discount committee?

A. No, I don't think we have anything of that kind. It is not headed in that way exactly.

Q. Who attends to that branch of the business?

A. The directors, I think, attend to all of that.

Q. Is there any other matters in which you and Andy are partners or interested together—any other corporations or anything of that kind?

A. Yes, sir; there is a corporation down in the Flathead country that he is interested in some, and I am interested in the same corporation.

Q. Do you hold your stock jointly? A. No, sir.

Q. You say that Judge Davis acted as president of the bank up to the time of his death, did he?

A. Yes, sir.

Q. Who signed the drafts that were issued by the bank? A. When he was alive?

Q. Yes, sir, when he was alive.

A. Well, at the time Mr. Hyde was there he was cashier and he used to sign the drafts. Afterwards, when Mr. Davis was cashier, I suppose he signed them.

Q. Were they signed by the president—any of them?

A. No, the president didn't sign, not unless there was no cashier there. He might do it then, just as I do now—if Andy should be out, I sign drafts as vice-president.

Q. You say that the Judge acted in the capacity of president all the time he was there? A. Yes, sir.

Q. Were there any stockholders' meetings held after the 27th of December, 1889?

A. Yes, sir; there have been stockholders' meetings held.

Q. Do you remember about when the first stockholders' meeting was held?

A. The first one after the 27th?

Q. After the 27th, yes, sir.

A. Well, I can't tell the date, but it was held at the regular time.

Q. Was it the fourteenth of January?

A. I couldn't say. Whatever time it was I suppose it was held at that time.

Q. Was the Judge present at that meeting?

A. We are speaking of after his death. No, sir; he was not.

Q. I speak of after the 27th of January, 1889.

A. Well, no, he was not at any meetings after that.

Q. Do you know whether any one actively and actually represented him in that meeting?

Mr. DIXON.—We object, first, that this is not cross-examination, and, second, that the best evidence of that is the minutes of the meeting, the records of the bank. It is calling for something the best evidence of which is the minutes of the meeting.

(Objection overruled. Defendant excepts.)

A. Well, to the best of my recollection, he was represented by a proxy from him.

Q. By whom? A. By John E. Davis.

Q. You speak, Mr. Talbott, of a tin box having been brought to the Judge's residence the day before, do you?

A. No, sir.

Q. The day before the gift that you refer to?

A. No, sir.

Q. When was that brought down to his residence?

A. It was brought down the same day that the gift was made.

Q. Did you not say something about his having directed it to be brought down the day before?

A. The day before he ordered it. He said, "When you come down you fetch that box of mine down."

Q. And this is the box, you take it, he referred to at that time? A. Yes, sir.

Q. And who do I understand he said this to—to bring the box down?

A. To Andy. He said, "When you come down tomorrow evening, you fetch that box down."

Q. In endeavoring to fix the date at which this gift was made, Mr. Talbott, you do it by reference to the execution of a deed by the Judge to yourself, do you?

A. Yes, sir.

Q. Where was this deed executed?

A. Down in his house—right in his house there.

Q. He had a little front-room office with a writing stand or table in the center, did he not?

A. Yes, sir.

Q. Was this deed executed at this little stand or table? A. Yes, sir.

Q. He signed it there? A. He signed it there.

Q. Where was Judge Davis sitting at the time that he gave this stock to Andy?

A. Well, he was sitting like if Mr. Dixon was sitting at the corner of the stenographer's table; I was sitting about this way and Andy was sitting about where the stenographer is; that was about the position.

Q. All around this little writing desk there together?

A. Yes, sir; a small little table. It is not as large as the stenographer's desk.

Q. How was the Judge's health during this time that you were having these business settlements with him?

A. It was poor; very poor, I think.

Q. You couldn't see any perceptible change in him from the time you commenced settling the business until he left, could you, or observe any?

A. Well, I couldn't say that he got any particularly worse or failed from day to day or anything. He went along about the same.

Q. Apparently about the same that he was in the beginning? A. Yes, sir.

Q. Who did the figuring during the time that you were having this settlement with the Judge?

A. Andy done it.

Q. Did he assist any in doing it?

A. No; he didn't assist any.

Q. He was present and participated in it?

A. Yes, sir.

Q. When he called for this box was it placed on this little writing stand or table? A. Yes, sir.

Q. The same one upon which this deed was signed?

A. Yes, sir; the same table.

Q. Was this stock unfolded—those certificates of stock, were they unfolded and opened up?

A. Well, he pulled them out of the box and they were all together. There were other papers in the box besides the stock, you know.

Q. Were they unfolded and examined?

A. Yes, sir.

Q. Are you familar with the stock of the bank?

A. Yes, sir.

Q. Has this stock blank assignments on the back of it for signature? A. Yes, sir.

Q. How long was it, if you can fix it, from the date that Judge Davis made this gift until he left here for Tacoma?

A. Well, my impression is that he left the next day after that gift; that is my impression, but I am not certain.

Q. Now, can you get at about what day in December it was that he made this gift? What day would you say it was, the 27th or the 28th?

A. Well, if I was going to say, I think it was the 27th, because, I think, he signed the deed the same night that the stock was given, on the table.

Q. Which did he do first, did he sign the deed before he gave the stock or afterwards?

A. He signed the deed before.

Q. You think it was signed the day before?

A. No; I don't know whether it was signed the day before or the same night; I couldn't say.

Q. You can't say really whether or not, then, this deed that was executed to you was signed at the same time or not that he gave this stock?

A. No; I couldn't say positively as to that; I couldn't say.

Q. It may have been signed at the time you had this conversation, may it not? A. Yes, sir.

Q. You think it is more probable that he left the next day?

A. After he made the gift I am satisfied he went the next day.

Q. You fix the date of that by the signature and date of the deed? A. Yes, sir.

Q. At the time that you say Judge Davis gave Andy this stock, did he make any written assignment of it or sign this blank assignment of it on the back of the stock?

A. No, sir; he did not.

Q. This room and writing desk that you refer to was in the front end of the building, wasn't it?

A. No, sir; it was in the back end.

Q. In the back end of his residence?

A. Yes, sir; the back end of the building, where his bed and all was in the same room. It was the last room that he ever used in the house.

Q. Were you acquainted with the business habits of Judge Davis, Mr. Talbott?

A. I think I was; yes, sir.

Q. You have had a great deal of business with him, one way and another, in the last eight or ten years before his death, haven't you? A. Yes, sir.

Q. What were his habits with respect to fixing up business in a business-like way and consummated things in a business manner?

A. Well, I used to think that he was pretty apt to do a thing up right.

Q. Generally left nothing undone when he undertook to finish up his business, did he, about business matters?

A. Well, I didn't think he would. I always thought he was a man that—

Q. He was apt to consummate things in pretty good shape? A. Yes, sir.

Q. So as to leave no questions about it? A. No.

Q. Wasn't he a very particular man to see that things were done up in such shape that there could be no contention about it?

A. That was what he always aimed to do, sir.

Q. Wasn't he especially that way in making things certain and absolute?

A. Well, a man would think it if he went to get anything from him. When he got done he would think he wanted to have it fixed just right.

Q. So there would be no question about it afterwards?

A. Yes, sir; that would be his idea.

Q. You say, I believe, that Judge Davis stated that he was going to the sound for the benefit of his health?

A. Yes, sir.

Q. Did he say anything about whether he thought it would improve it or not; that was his purpose in going?

A. That was his purpose in going, to see if it wouldn't.

Q. Was Judge Davis familiar with the by-laws and regulations of the bank there?

A. Well, I should think he was; I don't know. That is something I couldn't say, whether he was or not.

Q. He acted as president in the meeting of the directors and stockholders? A. Yes, sir.

Q. He seemed conversant with its by-laws, did he not?

A. I should think so.

Q. Wasn't he a man that would, from his characteristics, naturally investigate such matters and post himself thoroughly upon it? A. I think so; yes, sir.

Q. That would be his inclination? A. Yes, sir.

Q. A man of clear mind, wasn't he; pretty clear?

A. Yes, sir.

Q. And good business qualifications?

A. Yes, sir.

Q. Frequently called the attention of the directors to the by-laws and their application to matters that came up, did he not?

A. Yes, sir; I think I heard him do so.

Q. What kind of ink and pen did you have on that table at that time when the deed was signed and the conversation took place?

A. I couldn't say what kind it was.

Q. Black or blue or what?

A. Well, I can't say that. The document can tell whether it was black or blue, but I haven't got it with me.

Q. It was probably an ordinary inkstand and a steel pen?

A. That is what I think it was. I don't think it was anything else.

Q. What time of day was this when this transaction occurred? A. It was in the night, sir.

Q. You think it was in the night also when he signed the deed?

A. Yes, sir; I am satisfied it was in the night when he signed it. We used to go down there and stay there till ten or eleven o'clock, and sometimes we would go away before that. If we thought he was getting tired and wanted to go to sleep and wanted to rest himself,

we would slip out earlier. It was all nightwork that we did over that.

Q. Do you recollect how long before this it was that Judge Davis had been down to the bank?

A. Do I remember how long before this?

Q. Yes.

A. Oh, it must have been quite a while since he had been at the bank; I couldn't say now as to the length of time but he had not been in the bank for quite a long time.

Q. Sometime before? A. Some time before.

Q. Can you fix it anywhere near any particular date?

A. I don't think he had been in the bank for two or three weeks.

Q. Two or three weeks before this occurrence?

A. Yes, sir.

Q. You stated, I believe, that you can't remember the exact date when he returned?

A. No; I couldn't do that.

Q. Have you anything that you can refresh your memory from as to that date?

A. I don't know that I have or any way that I can refresh my memory.

Q. What was his condition within a day or two after his arrival or return from his trip to Tacoma?

A. It was very bad.

Q. What was his condition, mental and physical, say the next day or the day after that?

A. After he came back?

Q. Yes.

A. Well, he was in a condition that he was not fit to

walk across the floor without help. I was almost afraid to see him undertake it for the first day or two after he came back.

Q. What was his mental condition at that time?

A. He appeared to be clear the first day or two.

Q. But after that?

A. After that it was not; no.

Q. He would not be competent to know anything?

A. No; he would probably talk for a minute or two all right and ask me about the mines and how they looked and so on, and in a minute from that he would be all shook up again.

Q. You spokeabout the keys of thislittle tin box which enclosed the bank stock there. Do you know who had possession of those keys prior to this time?

A. I think Judge Davis always had it.

Q. Did you ever see anybody else have them?

A. No.

Q. Did you ever see him have them prior to that day?

A. Yes, sir; I have seen him open that box before.

Q. Do you remember about how often?

A. I think I saw him open it two or three times to my knowledge.

Q. Can you say whether you know if he left those keys with Andy frequently?

A. I don't. I think he always kept them with himself. I don't think that he ever left them.

Q. Do you know whether he did frequently leave them with Andy? A. That I can't say.

Q. You don't know? A. No.

Q. After his return from the coast did you see those keys at any time? A. No; I never saw them.

Q. Never saw them after that? A. No.

Q. This box was then, as I understand you, returned to the vaults of the bank? A. Yes, sir.

Q. By whom was that returned to the vaults of the bank?

A. Well, I didn't go right to the bank with Andy that night, but he had it and went to the bank and I suppose he put it in.

Q. He went there for that purpose?

A. Yes, sir.

Q. Have you seen that box frequently since?

A. Yes, sir; I have the box in my possession now.

Q. You say that you have not had possession of that stock, either as executor or otherwise, since that time?

A. No, sir; I haven't.

Q. You never had possession of it in any way prior to that time, did you? A. No, sir.

Q. In other words, you mean to say that Andy took possession of it and kept it? A. Yes, sir.

Q. And this suit is simply to try who is entitled to the possession of it? A. Yes, sir.

Q. I will get you to state whether you were a witness here on a former occasion, on a trial where the question of the ownership of this stock came up, for the purpose of ascertaining whether or not it should be credited as assets of the estate of Andrew J. Davis.

A. I was; yes, sir.

Q. You were sworn as a witness there, Mr. Talbott, were you? A. Yes, sir.

Q. And you gave in your evidence at that time?

A. Yes, sir.

Q. Can you remember about the date at which you gave in your testimony, Mr. Talbott?

A. The date that I gave it in then?

Q. Yes, sir; as near as you can get at it.

A. Well, it was the time that I gave it in—it was the time that the administrator question was up there.

Q. Can you recollect about what date it was?

A. I couldn't say now.

Mr. TOOLE.—We will ask the clerk to give us that date.

The STENOGRAPHER.—It was from April 19th to April 24th, 1890.

Q. Was it some time from the 19th to the 24th of April, 1890—about that time? A. Yes, sir.

Q. Were you interrogated at that time by Mr. Forbis, attorney for John A. Davis, and by Mr. Myers, attorney for Mr. Root and others, in reference to this matter of the gift of the stock? A. Yes, sir; I was.

Q. Were you asked this question, Mr. Talbott: "Where do you reside?" and did you answer it, "At Butte city, Montana"? A. Yes, sir.

Q. Were you asked the question, "How long have you resided here?" and did you answer it, "Since the winter of 1875, I think"? A. Yes, sir; that is right.

Q. In answer to the question, "Did you know Andrew J. Davis, now deceased, in his lifetime?" did you answer that you did? A. Yes, sir.

Q. In answer to the question, "How intimately?" did

you answer in substance, "I have been doing business with him pretty near for ten years or nearly twelve"?

A. Yes, sir.

Q. When asked when you were in his employ, did you say, "Some of the time"? A. Yes; I think I did.

Q. When asked what was the character of your employment under Andrew J. Davis, did you answer, "Managing agent of his mines"? A. Yes, sir.

Q. When you were asked, "Were you or were you not quite intimate with him"? did you answer that you were?

A. Yes, sir.

Q. When inquired of as to whether you knew Andrew J. Davis, Junior, did you answer, Yes?

A. Yes, sir.

Q. Mr. Talbott, here is a question propounded to you. I will read it and your answer: "I would like to call your attention to an occurrence between Andy J. Davis, Junior, and Judge Davis, deceased," a question by Mr. Forbis, "with reference to a conversation in which Judge Davis made certain gifts to Andrew, and I will ask you to state if you remember that conversation"; to which you answered, "I think I do; yes, sir." Is that correct?

A. I think it is.

Q. You were asked the question, Where was it? and in answer you said, It was at his house where he lived—Judge Davis' residence? A. Yes, sir.

Q. You were asked whether it was in this city and you answered, Yes, sir, did you? A. Yes, sir.

Q. You were asked then, and I call your attention closely to this, "State what occurred," and you answered, "Just before he started for Tacoma, going down on the

coast, I went there for seven or eight days. I had some business with him, and we were down there, Andy and I, different times in that seven or eight days before he left. With regard to this gift that he gave Andy in regard to this stock of the First National Bank, he had a box there, and he took the stock out and looked it over and gave it to Andy. He said he didn't know whether he would ever come back or not; there might be an accident on the railroad. We told him we thought that he would come back—that he would live ten or fifteen years." Is that your statement there?

A. That is right; yes, sir.

Q. You were asked then, "Andy told him that?" and you answered, "Yes, sir; and I did the same. He said the train might jump the track and might kill him, and he said, 'If I don't come back or anything happens I want you to have that.'" Is that your language?

A. Well, that is about the sum and substance of it—that he wanted him to have the stock.

Q. "At that time what was the condition of Andrew J. Davis, deceased?" and you answered, "I think it was poor. His physical condition was poor." Is that correct also? A. Yes, sir.

Q. "Was he ill at that time?" and your answer was, "Yes, sir." That is correct, is it? A. Yes, sir.

Q. You were asked, "What was he going to Tacoma for?" and you said, "He thought it might improve him." Is that correct? A. Yes, sir.

Q. You were asked, "What did he do towards delivering this stock to Andy?" and you answered, "He gave

the stock to him; put it over to him across the little table." Is that correct? A. Yes, sir.

Q. "What was Andy's condition at that time, mental and physical?" Your answer is, "He was sitting at the table in a chair and had this tin box there."

A. Yes, sir.

Q. "The young man?" "Yes, sir."

A. Yes, sir.

Q. You were asked, "Have you detailed pretty much the conversation?" You answered, "I think about what transpired." A. Yes, sir.

Q. On your examination by Mr. Myers this question was asked you, was it: "Mr. Forbis asked you why the Judge was going to Tacoma, and you answered that he thought it would do him good. How do you know he thought so?" You answered, "I don't know that he thought so. We thought so, and he did, too." Is that correct? A. Yes, sir.

Q. "Did he say so?" You answered, "Yes, sir; he did. He said when he was down there before with Judge Knowles and Dixon it did him good, and he was going down to see if it wouldn't do him good again." That is correct, is it? A. Yes, sir.

Q. "What were his words, as near as you can recall them?" You answered, "He said he was going down the coast; that it did him good before and he was going down to see if it wouldn't do him good again. It was the best place that he had found in all of his travels." Is that correct? A. Yes, sir.

Q. You were asked if he returned from there, and you said that he did? A. Yes, sir.

Q. What you stated there is correct, is it, Mr. Talbott?

A. Yes, sir; that is about the substance of it.

Q. To the best of your knowledge?

A. To the best of my knowledge; yes, sir.

Q. And that is a correct statement of what transpired? A. Yes, sir.

Q. It was given by you shortly after the gift, which was some four or five years ago. This testimony was given soon after the transaction occurred?

A. Yes, sir.

Q. And you would be more likely to remember then what transpired, would you not?

A. Well, if I say anything to-day any different it can't be much different, because it is all in the same meaning—the same idea. I can't see where it would make any difference particularly.

Q. Well, you were called to give his language as near as you could, and you did it, didn't you, to the best of your knowledge and judgment? A. Yes, sir.

Q. Mr. Talbott, there is one thing. You think that Judge Davis left for this trip on the 27th of December, '89?

A. No; I wouldn't say on the 27th. I think that would be the night before and he would leave the next day, and that would be the 28th.

Q. Well, I mean this gift was made on the 27th?

A. Yes, sir; that is what I think.

Q. Now, where was the Judge prior to that time, in this city?

A. Yes, sir; he was in the city. From the time he

came back with Mr. Dixon and Knowles he was not away anywhere.

Q. Do you know how long he was in the city of Butte here before this gift was made, Mr. Talbott?

A. He must have been here—if I knew the time that he came back from below I could tell pretty close, but I don't know how long he was gone down there. It would be anyhow 30 or 40 days and maybe 50 days, but I couldn't say positive as to that.

Q. Do you know what time it was that he was down at Tacoma with Mr. Dixon and Judge Knowles?

A. I know he was down there before September?

Q. You know it was before September?

A. Yes, sir.

Q. He never made any trip down there between September and December 27th?

A. No, sir; he was here. He didn't make any trip after that.

Q. You know he was here during all of October, do you? A. I am satisfied he was; yes, sir.

Q. And all of November? A. Yes, sir.

Redirect Examination.

(By Mr. DIXON.)

Q. Who was John E. Davis, Mr. Talbott?

A. He was a son of John A. Davis.

Q. A brother of Andy? A. A brother of Andy.

Q. You speak about this writing desk or table on which you say this deed was signed and at which the party was seated when this conversation took place. What room of the house do you say that room is in?

A. It is in the north end of the house.

Q. The back end of the house?

A. Yes, sir; the back end.

Q. Is it a writing-desk or a table?

A. It is just a little table. I think it has got round corners, if I recollect properly. I know it is a very small table.

Q. In the testimony that has been read to you that you gave on the hearing with reference to the propetry of the estate, do you consider that you gave any different account of this transaction from what you have given here to-day?

Mr. TOOLE.—We object to that.

(Objection sustained. Defendant expects.)

Q. Did you on that former examination state everything that occurred?

A. No, sir; I didn't state everything.

Q. Have you upon this examination stated everything that occurred, as well as you could remember?

A. I think so; everything that would be connected with the case. There were little things came up there talking about different things, but nothing about that gift or anything.

Q. You stated in your former examination, as read to you, that Judge Davis said that something might happen to him—the train might run off the track. How did he come to make that remark?

Mr. TOOLE.—We object to that; incompetent.

(Objection overruled. Plaintiff excepts.)

A. The reason was that we told him, you know, that we didn't think—tried to brace him up and make him

think that he was not so bad off, you know, and then it was that he said the train might jump the track and he get killed that way. He said, "You are taking chances all the time when you are on a train," or something to that effect. That was how that came about.

Q. When you were called to testify upon this prior hearing, Mr. Talbott, did you know that you were going to be called before you went on the stand?

A. No, sir; I did not.

Mr. TOOLE.—We object to that; immaterial, irrelevant, and incompetent.

(Objection overruled. Plaintiff excepts.)

Q. Had you on that occasion or prior to your being called on that occasion given any particular thought to that matter? A. No; I hadn't; not a thing.

Q. If there is any difference in the statement that you gave on your testimony before and that you have given now, which would you say was correct?

Mr. SANDERS.—We object to that; incompetent and irrelevant.

(Objection overruled. Plaintiff excepts.)

A. Well, I think that the statement I gave to-day is as near correct as I could give it, then or any other time. I don't see how I could better it any. There might be a word here and there that would mean a little different, but at the same time it all means the same to me when I come to put it all together.

Recross-Examination.

(By Mr. TOOLE.)

Q. There may, you say, have been some things transpire that you did not testify to on the former trial, but what facts you did testify to on this former trial are correct, are they not—the facts?

A. Well, I should say that they were; yes, sir.

Q. While you might not have remembered some things that you testify to now, what you did testify to then is correct? A. Yes, sir.

And it being conceded on the trial of this cause that the said defendants had the affirmative, the following testimony was introduced to support the issues joined by the pleadings herein on their part:

JAMES A. TALBOTT, plaintiff in this action, being introduced as a witness on behalf of the defendants, testified as follows:

I am the plaintiff in this action and special administrator of the estate of Andrew J. Davis, deceased, and reside in Butte city, Montana, and have resided there since 1875, and am engaged in mining. I am acquainted with the institution known as the First National Bank of Butte and have been acquainted with it since it first opened, say 12 or 15 years. I have occupied the position of director and for the last three years have been president in that bank. I have been a director eight or nine years, possibly 12 or 13 years, since the bank opened. I am now vice-president. I know Andrew J. Davis, commonly called Judge Davis, and know when he died, which was on the 11th of March, 1890. He died at his residence

on East Broadway, in Butte city, Montana. I had been acquainted with him since 1864, and was very intimately acquainted with him for the last 18 or 20 years; was connected with him in business, in milling, I think, about seven or eight years before he died, probably 12 years or very near. Judge Davis was president of the First National Bank of Butte at the time of his death.

I am acquainted with Andrew J. Davis, one of the defendants in this action. I have been acquainted with him about 12 years; it might be a little more. I did not know him before he came to Montana. I have known him very intimately for the last eight or nine years. He is cashier, I would say about three years probably, say three or four years. He had been employed in the bank before that; in fact, ever since he came to the State, probably for 12 years; for the last twelve years, I should think. Andy managed the business of the bank for the last two years or thereabouts before the Judge's death. Andrew was a nephew of the Judge.

Whereupon the following interrogatory was propounded to the witness:

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis, or as to his (Judge Davis') affection or liking for him? If so, when and what did Judge Davis say?

Which said question was objected to by counsel for plaintiff as incompetent and immaterial, and which said objection was overruled at the time and duly entered in accordance with the statute in such case made and provided.

And in the argument of the said question E. W. Toole,

of counsel for plaintiff, limited his objection thereto, "more particularly in so far as it applied to the business capacity of the said Andrew Davis"; which objection was likewise overruled by the court, and to which ruling the said plaintiff, in due and proper form and in accordance with the statutes in such case made and provided, excepted.

A. The Judge thought there was nobody like him as to his business qualifications. Pertaining to the bank and so on, he always thought he could not place anybody like him. He always spoke of him as a good business man and just the man he wanted there and had to have, and that he was lucky to have him there. He spoke of this matter to me many different times. He spoke of it the last year of his life, and I know he talked of it in 1889 more than once—a great many different times. He always spoke to me of Andy as a father would of his son. He felt that way apparently from his talks with me. He felt proud of him. This occurred frequently.

And the said defendants propounded the following question to the said witness:

Q. Did you at any time before the 27th or 28th of December, 1889, hear Judge Davis say anything as to what disposition he intended to make of the First National Bank of Butte, or his stock in it, in case of his death? If so, when and what did he say?

To which interrogatory counsel for plaintiff objected for the reason heretofore stated and for that it is incompetent and inadmissible, as the validity of this gift depends exclusively upon what transpired and what was said at the time it was made.

Which objection was by the Court overruled; and to which ruling of the court the plaintiff then and there duly excepted and had the same entered in accordance with the statute in such case made and provided.

A. I heard him say that he never intended the bank to go in his estate; that he had always intended that for Andy, and that was what he expected to do with it.

This was after the fire at the bank, as near as I can recollect, and that was in September, 1889, when he talked to me about that. I think it was across the street —when he moved across after the fire. I heard him say that at different times. I saw Judge Davis about the 27th or 28th of December, 1889, and was present at that time that the conversation had occurred between Judge Davis and Andy relating to the stock of shares in the First National Bank of Butte owned by Judge Davis. It was sometime between the 27th and 29th of the month of December, 1889. I cannot give the date any more particularly. I had some papers signed on the 27th of the month. It was but a few days before he went away, and he left before New Year's. It is between the 27th and 29th and after dark. There was present at this conversation Andrew Davis, Judge Davis, and myself. There may have been others in the house, but cannot say others were in the room. I don't remember of any one else being there. The way I came to go up to Judge Davis' house was this: We had been for seven or eight days there settling, and Andy was with us all the time, and whether we wound up everything on the 27th or not as to our business I don't recollect positively, but it was the night he signed this deed; a deed, I mean, of some prop-

erty that he deeded to me. When I reached the house that evening there was nobody there but Judge Davis. Andy came in afterwards. He brought with him a box; an iron or tin box it might be called. It was a painted box and a box that belonged to the Judge. I had seen it before that time. It was generally kept in a vault of the bank. I did not know particularly what it contained until that night. Judge Davis kept the key to it. At the time of this conversation Judge Davis' health was poor. He had not been in good health for four or five or six months. He was in very bad health. He had not been well for a year or more and worse than commonly before this.

Here the witness was asked the following question:

Q. State what, if anything, you heard Judge Davis say prior to the time of this conversation as to his expectation of recovering his health.

To which interrogatory plaintiff objected for the reason that it called for a declaration prior to the time of the gift touching his health at that time; which objection was overruled and exception duly taken and entered in accordance with the statutes in such case made and provided.

A. Well, he even said to me that he did not never expect to recover from it; that he was too old to get over it; could not overcome the disease.

He spoke that way frequently. I took him buggy riding frequently, and he would say to me that he was too old to handle this disease that he had. He was about 70 years old when he died, and this conversation was the year before. I think he was close to 70. His mind was

sound at the time of this conversation, and I think he could transact business as good as he ever could in his life, as far as I know. I had had quite a settlement with him and do not think that he overlooked anything. I had business with him right up to this date. I don't know of him transacting business with anybody else. The business I had with him was with reference to money that I owed him on a sale of the mines, being a settlement of accounts between him and myself, which extended over about seven years and seven or eight months, and included many different items and matters and covered considerable money. I cannot say positively whether the deed was signed on the same day of the settlement or not, nor whether it was signed on the same day of the conversation. His mind was all right as far as I could see. I think his mind was perfectly sound. From the business I transacted with him I should not think otherwise. He might become a little tired, and it took a little longer to make the settlements. We would not be there more than three or four hours in the evening, and then we would let him have a rest when he would get tired, and we would say to him that we would let it go to the next day. He would get a little tired, but was all right. This had been going on for seven or eight days, during all of which time we talked about our business affairs every day, and the matter was finally concluded between us on the day this conversation occurred or the day before, I am not sure; think it was the 27th. The conversation to which I have referred between Andy Davis, Judge Davis, and myself was this: He ordered the box fetched down the day before. Now, that might have been the 27th when

he ordered the box. He said, "When you come down to-morrow, fetch my box down," and he told me to come down too. I came down ahead of Andy and was there in the room before Andy came down, and Andy came down later on, and the Judge was down below in the kitchen or down in the dining-room below, and he came up after Andy came. I am not sure whether Andy went down after him or not, but anyway he came up, and then he went to look at these papers in the box and pulled the papers out on the table. I mean the Judge did this, and looked round them awhile and finally said, "Where is all of this? This is not all. There is something is not here." And it appeared he got them all pulled out together and did not get them all. I mean the shares of the bank stock. Andy told—he guessed they were all there, and he pulled the papers over and looked at them and found the missing papers, and figured it up and said they were all there. Andy is the one that did this. It was the stock of the First National Bank of Butte. Andy figured it up and told him, "That is all; it is all here." "Well, now," he says, "there is fifty shares in the directors' hands." Then he commenced going over the directors and he came down to Hauser, and it appeared as if Hauser had nothing there. He had nothing there to represent from Hauser. I mean nothing to show how Hauser held the stock. So he said to Andy, "You write to Hauser and see that he signs a contract, and do it right away." Then the stock was all right, and it was understood to be 950 shares. Andy counted it up, and there was 950 shares outside of what the directors had. Andy passed them over to the Judge after he figured up

and showed him what there was of it, and he passed it back again, and he said, "I have always intended that for you, you take it." After the Judge had received it from Andy he passed it back over to Andy when he said this. He said, "I have always intended that for you, and I want you to take it." Andy took it, and I sat there and it was a kind of a surprise to me. I did not expect anything of the kind. I did not know what he did. I supposed he had his business or maybe would fix his business in a different way, but he did that, and he said, "I always intended to do that and now I will do it." Andy picked up the stock and we commenced talking to him and telling him that we did not think that he was so ill. Andy put this stock in his pocket. We told him (the Judge) that we did not think he was seriously ill as he might think. "Well," he says, "I am an old man and there is no telling. I cannot stand what I used to. I do not think I can get over this disease." He says, "I cannot stand it. I am too old; I cannot expect it." As near as I can state just what he said with reference to his expectation to recovering was this. He just said that he did not expect he could. He said, "We might think it, but," he says, "don't. I only hope it will be so, but I don't think it." We told him that we thought he would if he would go down there and give his business up and not be bothering about it. We thought he might improve. He said that he did not think so, but that he was going to try it anyway, and he said, "I will get ready and go in the morning," and I think he went the next day after. When Judge Davis gave Andy this stock he put it in his pocket. I don't know what became of the key. I don't know and

I cannot say who kept the key. There were four pieces of stock. Andy figured up this stock. There were four certificates, I mean, of the stock. Andy had the stock in his hands when he figured up the stock. He handed them back to the Judge and the Judge handed them back to Andy. They were the same certificates. I never have seen them afterwards. I mean after this conversation. I never have had them in my possession as special administrator. I think Judge Davis left about the next morning after he gave Andy these certificates. He started to go to the sound and stopped at Tacoma. I believe that is where he stopped at.

And the said defendant propounded to the said witness the following question:

Q. State, if you know, from Judge Davis' declarations or otherwise, when he left Butte after that conversation.

Which question was objected to as incompetent and hearsay testimony and not touching any proposition upon which hearsay testimony is admissible nor a part of the res gestae.

Which objection was overruled, and to which ruling of the court the plaintiff then and there duly and properly excepted.

And in answer to the said question the said witness stated:

A. He said he went to see if he could not improve his health. John A. Davis, his brother, went with him. I don't remember the exact time when he returned. Andy came back with him. John A. Davis is dead. After the Judge returned to Butte he stayed at his residence until his death. He saw me the morning that he came back.

His health was worse. He was worse off when he came back than he was when he went away. He was considerably worse. I saw him every day after his return to Butte from that time on. He went down all the time from the time he came back. I don't remember how long it was after his return he died. It was probably three weeks, maybe four, but he died after he came back.

And the said witness, upon his cross-examination, stated substantially as follows:

I knew Judge Davis since 1864. My personal relations were friendly with him. I bought liquors from him and then afterwards we were partners in mining ventures. I have known Andrew since he came here—I think, about twelve years. He is cashier of the First National Bank of Butte and I am vice-president of it. I have held that position about three years. I have held it since the Judge's death, and was a director before Andrew held the position of cashier, before the Judge's death. I think either cashier or assistant cashier. Judge Davis, up to the time of his death, was president of the bank from its organization. I don't think he was a director; I am not sure, however. Andrew and myself have been on good personal relations ever since I have known him. We have been interested in some little purchases, like the purchase of mines, locating them or patenting them, or something like that; we are partners in mines, but are not operating them; we have been partners or joint owners in these mines I don't think over four years. I suppose Andrew has had charge of the bank as cashier, together with the directors, who have acted with him since the Judge's death in directing him what he should

do and what should be done and so on, and advising him with regard to such things as that. I don't think we have any examining or discount committee; the directors attend to that branch of the business, I think. We are also interested in a corporation down in the Flathead country —that is, he is interested in some of it and I am interested in the same corporation, but we don't hold our stock jointly. When Mr. Hyde was there and cashier of the bank he used to sign the drafts, and afterwards, when Mr. Davis became cashier, I suppose he signed them. The president did not sign them unless the cashier was not there; he might do it then, just as I do it now as vice-president. All the time the Judge was there he acted in the capacity of president. There has been stockholders' meetings held since the 27th day of December, 1889. There was one held at the regular date after that time. I suppose it was held on the 14th of January. The Judge was not at any meeting after the 27th of December, 1889; he was represented at that meeting by John E. Davis, his proxy. The day before the gift the Judge directed Andy to fetch down that box of his, and it was brought down the next day. I fix the date of the gift by reference to a deed executed by the Judge to myself; it was executed down in his house. He had a little room, front room, office, with a writing stand or table in the center, and this deed was executed at this little stand. He signed it there. At the time Judge Davis gave this stock he was sitting like Mr. Dixon was sitting at the corner of the stenographer's table, I was sitting about this way, and Andy was sitting about where the stenographer is; we were all around the small little table; it is not as large as

the stenographer's desk. Andy figured up the stock, no one assisted him in doing it, and the box was placed on this little writing stand, the same upon which the deed was signed. These certificates of stock were there unfolded and examined. The stock has a blank assignment on the back of it for signatures. I think that this gift was made on the 27th, because he signed the deed on the same night the stock was given on the table. He signed the deed before he gave the stock. I don't know whether it was signed the day before or on the same night. This deed may have been signed at the time we had this conversation. At the time the Judge gave Andy this stock he did not make any written assignment or sign the blank assignment of it on the back of the stock. The room and writing desk I refer to at which we were sitting at the time this stock was given was in the back end and not the front end of the house. His bed and all were in the same room. It was the last room he ever used in the house. I was acquainted with the business habits of Judge Davis. I have had a great deal of business with him one way or another in the last eight or ten years before his death. His habits with respect to fixing up business in a business-like way and consummating things in a business manner, I used to think he was pretty apt to do. I don't think he would leave anything undone when he undertook to finish up his business about business matters. He was apt to consummate things in a pretty good shape so as to leave no question about it. He was a very particular man to see that things were done up in shape that there could be no contention about it; that is what he always aimed to do, sir. A man would think if he

want to get anything done from him when he got done he would think he wanted to have it fixed up just right. A man would think that he was especially that way in making certain and absolute so there could be no question about it afterwards; that would be his idea. He stated that he was going to the sound for the benefit of his health. It was his purpose in going to see if it would not improve him. I should think Judge Davis was familiar with the by-laws and regulations of the bank. I don't know that he was, and it is something that I cannot say. He acted as president in the meetings of the directors and stockholders and seemed conversant with its by-laws, I think. He is a man who would naturally investigate such matters and post himself, I think; that would be his inclination. He was a man of clear mind and good business qualifications; would frequently call the attention of the directors to the by-laws and their application to matters that came up. I think I have heard him do so. I cannot state what kind of pen and ink was on the table at the time the deed was signed and at the time the conversation took place. The document will tell whether it was black or blue, but I haven't got it with me. It was an ordinary inkstand and steel pen. The transactions was at night. I think it was at night when he signed the deed; I am satisfied that it was at night when he signed it. It had been a long time before the Judge had been in the bank before this conversation or gift occurred. I cannot state how long; two or three weeks or more. A day or two after his return his condition was very poor; was not able to walk across the floor without help. I was afraid to see him undertake it for the first day or

two after he came back. His mind was clear the first day or two after his return; after that it was not. He would not be confident to know anything. I think prior to the death of Judge Davis he had possession of the keys to this little tin box. I don't know that I ever seen anybody else have them. I had seen him have them before that day. This little tin box was after that returned to the vaults of the bank by Andy, I suppose; he went there for that purpose. I have seen the box frequently since and have it now in my possession. I mean to say that Andy took possession of the bank stock and kept it, and that I have not had possession of it, and that this suit is simply to try who was in possession of it. I was a witness in the former trial, where the question of the ownership of this stock came up for the purpose of ascertaining whether or not it should be credited as assets of the estate of Andrew J. Davis. I was sworn there as a witness and gave in my evidence; it was from April 19th to April 24th, 1890, or about that time. I was interrogated by Mr. Forbis, attorney for Mr. John A. Davis, and by Mr. Myers, attorney for Mr. Root and others, in reference to this matter of the gift of the stock to Andy. I swore I resided in Butte City, Montana, and that I had resided there since the winter of 1875; that I knew the deceased in his lifetime; that I had been doing business with him for ten or twelve years, and stated that I was in his employ some of the time, and that I was managing agent of his mines; that I was quite intimate with him; that I knew Andrew J. Davis, Jr. I testified that I remembered the conversation in which Judge Davis gave to Andrew Davis the bank stock; that it occurred at the resi-

dence of Judge Davis, in this city. I testified that just before he started for Tacoma, going down on the coast, I went there for seven or eight days. I had some business with him, and that we were down there, Andy and I, different times in that seven or eight days before he left. With regard to this gift that he gave Andy—in regard to this stock of the First National Bank—he had a box there, and he took the stock out and looked it over and gave it to Andy. He said he did not know whether he ever would come back or not; there might be an accident on the railroad. We told him that he thought he would come back, and that he would live ten or fifteen years. That is what I testified to then. It was Andy who told him that he thought he would come back and would live ten or fifteen years, and I did the same. He said "the train might jump the track and might kill him," and he said, "If I don't come back or anything happens I want you to have that." That is what I testified to; that is about the sum and substance of it—that he wanted him to have the stock. I also testified at that time that his physical condition, I thought, was poor. I also testified that he was going to Tacoma because he thought it would improve his health. I also testified that in so far as delivering the stock to Andy was concerned, he gave the stock to him; put it over to him across the little table. I also testified that I detailed pretty much the conversation, and that that was what transpired. Mr. Forbis asked me whether the Judge was going to Tacoma, and I answered that "He thought that it would do him good"; that we thought so, and he did, too. He said, "When he was down there before with Judge Knowles and Dixon it

did him good and he was going down to see if it would do him good again." He said, "It was the best place he ever found in all his travels." I also testified that Mr. Davis returned. What I testified to on that occasion is correct and is about the substance of it, to the best of my knowledge. It is a correct statement of what transpired. It was given by me shortly after the gift, which was four or five years ago. If I have said anything to-day any different it cannot be much different, because it is in the same meaning, the same idea. I cannot see where it would make any difference particularly. I was called on then to give the language as near as I could and did it to the best of my judgment.

On redirect examination the witness testified:

The little writing desk referred to is just a little table; I think with round corners. I mean the one where the deed was signed and is in the north end of the house. I did not state on the former testimony everything that occurred. I think I have done so this time—everything that would be connected with the case. We had told that to Judge Davis, trying to brace him up and make him think that he was not so bad off, and it was at that time that he said the train might jump off the track and he get killed that way. He said, "You are taking chances all the time when you are—the train," or something to that effect. That is how he come to say that the train might run off the track or something happen to him.

At the time I gave my former testimony I did not know what I was going to be called for; I had not given any particular thought to the matter.

And thereupon the witness was asked the following question:

Q. If there is any difference in the statement that you gave in your testimony before and that which you have given now, which would you say was correct?

Which question was objected to by plaintiff's counsel as irrelevant and incompetent, and which objection was overruled by the Court; to which ruling of the Court plaintiff then and there duly excepted in accordance with the statute in such case made and provided.

To which question the witness answered:

—. Well, I think that the statement that I gave today is as near correct as I could get it then or any other time. I don't see how I could better it any. There might be a word here and there that might mean a little different, but at the same time it all means the same to me when I come to take it altogether.

On cross-examination the witness testified as follows: There may have been some things transpired that I did not testify to on the former trial, but what facts I did testify to on the former trial are correct. They were facts. Well, I might have remembered some things that I testified to now, but what I did testify to then is correct.

ANDREW J. DAVIS, being called as a witness, and being the defendant in this action and called for the purpose of testifying with reference to facts that occurred during the lifetime of the said deceased and with reference to conversations had with him, his competency as a witness was objected to by the plaintiff under section 647 and 646 of the Compiled Statutes of the State; which objections was sustained.

CONRAD KOHRS, a witness on behalf of the defendants, testified as follows:

That he lived in Deer Lodge, and lived in Montana since 1862, and that he was intimately acquainted with Andrew J. Davis since 1894; that he met him often and was on very friendly terms with him, and knew him in Butte ever since he resided there and commenced his mining operations. His relations with him were intimate and pleasant. I had no business transactions with him until 1882, since which time he had frequent business transactions. I am acquainted with the association known as the First National Bank of Butte and have known it ever since its organization, and know the defendant, its cashier, Andrew J. Davis, and have known him about ten years. Here the following interrogatory was propounded to the witness:

Q. State, Mr. Kohrs, whether or not you ever heard Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for him. If you did, when and what did Judge Davis say?

To which interrogatory, and especially the former portion thereof referring to the business capacity or character of the said Andy Davis, and also the latter portion thereof referring to the affection or liking for him by the deceased, the same objection was interposed as had theretofore been interposed to a similar question propounded to James A. Talbott; which objection was overruled by the Court, and to which ruling of the Court the plaintiff then and there duly and properly excepted, and which exception was duly and properly entered in accordance with the statute in such case made and provided.

To which question the witness answered as follows:

A. Well, he always told me that he thought that Andy was a good boy, and that he had a good deal of confidence in him, and that he was a good business man and very capable in the position that he had at that time.

I have heard him say that several times before he dies. I used to go often to the Judge's rooms and spend the evening with him. The Judge had been to Europe and was telling me a good deal about his trip to Europe. He spoke of him (Andy) and said he filled the place better and was more of his own stripe. The old Judge was very close, you know, and I think that Andy is as close a business man, and for that reason he liked him and he said often that he would do something for him at that time. I heard him make these remarks very frequently, and the Judge always regarded him as a close business man.

Whereupon the plaintiff called the attention of the Court that it was the desire of plaintiff that it should appear that all of this testimony goes in under objections to the original question; to which Mr. Dixon, attorney for defendant, consented, and which was so ordered by the Court.

And thereupon the following question was propounded to the witness:

Q. Did you at any time hear Judge Davis say anything about what disposition he intended to make of the First National Bank of Butte or his stock in the bank in case of his death?

To which question plaintiff objected for the reason that it is incompetent, immaterial, and irrelevant, and for the reason that the facts and statement at the time of the alleged gift must control it independent of such declara-

tions and be sufficient within itself to constitute a gift causa mortis.

Which objection was by the Court overruled, and to which ruling of the Court the plaintiff then and there and at the time duly excepted in the manner hereinbefore set forth; which said exception was thereupon entered in accordance with the statutes in such case made and provided.

The witness further testified that the Judge had been to Europe, and some time in July, 1889, down at his house in Butte, his private residence, I spent an evening with him there. He spoke of going to Europe again, and desired me to accompany him on the trip and proposed to pay my expenses. He said, "I intend to make another trip to Europe, and before I go I am going to give the bank to Andy." That is what he stated and this is the way the conversation came about. Here plaintiff moved to strike out all of the witness' statement with reference to what the deceased intended to do with the bank or bank stock, for the reason that it was based upon the condition that he got to Europe and for the reason that he did not go; which motion was overruled and exception duly taken and entered in the manner and form aforesaid.

Continuing, the witness said: Shortly afterwards he again told me that he wanted to call in all of his outside business, and that he had intended to give the bank to Andy. He was anticipating at the time of going to Europe that fall.

Here plaintiff moved to strike out said answer for the reason last stated herein; which motion was overruled by the Court, and to which ruling of the Court plaintiff

then and there duly excepted and had the same entered in accordance with the statute in such case made and provided.

DANIEL W. DILLINGER, a witness on behalf of the defendants called, testified as follows:

That he was a resident of St. Paul, Minnesota, and that he resided in Butte City up to 1886, and that he had resided there since the spring or summer of 1876; that he knew A. J. Davis, commonly called Judge Davis, in his lifetime, and knew him since 1876 up to the time of his death. After leaving Butte City I visited that place about twice a year, and I was intimately acquainted and friendly with Judge Davis. I roomed at the bank and associated with him most every day when in town. I commenced rooming at the bank in 1883 and roomed there off and on up to 1886. I know the First National Bank of Butte and have known it since 1876. I know Andrew J. Davis, commonly called Andy Davis. He is defendant in this action. I have known him since 1880 or '81. I roomed with him from 1883 till 1886.

Here the following question was propounded to the witness:

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for him? If so, when and where and what did Judge Davis say?

To which question the same objection as heretofore was interposed, and the same order of Court overruling the same was made, and to which ruling due and proper exceptions were taken by the plaintiff.

To which question the witness answered:

A. I did. It had been mentioned quite often. He said that he was in *the* fact the only nephew that he had that amounted to a damn outside of John, and he said John had no force. He said he was going to try and make a banker out of him, and that it was his intention to give him the bank. He had a great liking for Andy. He used to want me to check up on Andy. If I had I might have been committing myself. I did not know what he meant by that. This occurred on a great many occasions from 1883 to 1886.

Q. Did you at any time hear Judge Davis say anything as to what disposition he intended to make of the First National Bank of Butte or its stock in case of his death? If so, when and what did he say, and under what circumstances did any such conversation occur?

Which question was objected to by the plaintiff for the reason set forth in the objection to a similar question propounded to Conrad Kohrs in that the gift causa mortis could only be established by what transpired at the time the gift was made, and that whatever may have been the intention upon the part of the deceased to do at the time of his death is incompetent as tending to establish a gift causa mortis; which objection was overruled, and to which ruling of the Court the plaintiff then and there in due form of law excepted.

A. In a month of December, '85, we were on our way to the city of Mexico by way of New York—that is, Judge Davis and myself—and he said that he thought that it was a great mistake that Mr. Hyde and myself had not purchased the bank which we had been talking about

doing. He said as long as we had not it was his intention to give the bank to Andy in due course of time. He told me this in the strictest confidence at the time. In 1889, some time in the fall, I came to Butte to adjust a loss, having property in the same block as the bank which had been burned. They were then doing business across the street from the present location, and I went in to interview the boys in the bank, and talked the kind of a building they were going to put up. I went to the Judge's office to talk with him, and suggested that if the bank was only one story Andrew would have no place to sleep.

The Judge had stated that he intended to put up only a one-story building, because he could make it strictly fireproof. After I had suggested that Andy would have no sleeping room he hesitated a moment and said he had not thought of that, and it was perfectly right that Andy should have sleeping-rooms, as the bank belonged to him. "If you have time we will go up and see John and see if it can be changed from one to two stories." We went up and asked John the question, and he said, "Yes; I can run it up six stories if you want, and he said,—while, "As the bank belongs to Andy, you will put him in a set of rooms, bath-room and everything complete." That was all the conversation, and in occurred in '89.

Whereupon the plaintiff moved to strike out all the testimony of said witness as incompetent and immaterial; which motion was overruled by the Court and exceptions then and there properly taken in accordance with the statutes made and provided.

GEOFFREY LAVELLE, a witness on the part of the defendant, also testified:

I reside in Butte; have lived there since 1875; knew Andrew J. Davis, commonly called Judge Davis, since 1873 up to the time of his death I was slightly acquainted with him up to the fall of 1875, in Butte. I had a good deal of business with him in a business way. I banked with his institution for a number of years from the time it started. I think one year after the S. T. Hauser & Co. bank started I have banked with that institution, and am acquainted with the First National Bank since its organization and have known Andrew J. Davis, commonly called Andy, since '72.

Here the following question was asked by defendants:

"Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for Andy; and, if so, when and what did Judge Davis say? State the circumstances of the conversation."

To which question plaintiff then and there duly objected for the reason hereinbefore stated; which objection was overruled by the Court and exceptions then and there properly and duly taken; and the witness in response to the question said: I met Judge Davis in San Francisco in 1887, at the Palace Hotel, and in conversation with him about young men generally who were doing business in Montana he referred to Andy as being a capable young man—the best in the Davis family—he and John, particularly Andy, as competent, and that he had a bright promise for the future. He said nothing about his affections for Andy, but seemed to think a good deal of him, so far as I could judge from his conversation.

The latter portion of which answer, respecting the wit-

ness' opinion—moved to strike out; which motion was sustained by the Court.

JOSEPH BROUGHTON, being a witness for the defendants, also testified:

I live at Walkerville, in Silver Bow county, and have lived there 13 or 14 years; was acquainted with Judge Davis during his lifetime; knew him 10 or 11 years; was rather intimately acquainted with him in a business way also, havng done my banking business with him. We were quite familiar with one another. He would ask me down to his house once in awhile and we would have disputes and agreements, and so on. I am acquainted with the First National Bank of Butte, and know Andrew J. Davis, commonly called Andy, and have known him, I think, 9 or 10 years.

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or his, Judge Davis', affection or liking for Andy? If you did, state when and what you hear; tell us the circumstances of the conversation.

To which question plaintiff interposed the objection as heretofore.

Which objection was overruled and exceptions in the manner heretofore stated duly and properly taken and entered.

A. "He always spoke very highly of Andy, and had great confidence in him, and felt quite safe in leaving business matters with him and in his hands, and so on." I think this occurred two or three times at his house. It must have been six or seven years ago. It must be some-

where in '88 or '7; I don't like to be sure, but from that time on we were quite intimate.

Q. Did you at any time hear Judge Davis say anything as to what disposition he intended to make of the First National Bank of Butte or his stock in it in case of his death? If so state the conversation, when and where it was, and what was said and all the circumstances.

To which question the plaintiff then and there objected for the reason that the alleged gift causa mortis could only be established by the facts and transactions that occurred at the time it was made, and that the independent fact as to the intention of the said donor to give it at the time of his death was incompetent to establish such a gift, and that it was immaterial to such intention.

Which objection was overruled by the Court; to which ruling of the Court the plaintiff then and there in due form of law excepted and which exception was duly entered accordingly.

To which question the witness answered:

A. I have had conversation with him on that subject. The last conversation we had I remember it because we were in the bank at the time it was being rebuilt. He told me that he was not interested himself very much in building the bank; that Andy's father was superintending it, and that when it was completed and all there was belonging to it—

Whereupon plaintiff moved that the answer be stricken out, as it had no reference to the question of the gift in controversy in this action but referred to an intended gift at the time of the completion of the bank, which does not appear to have been executed.

Which motion was by the Court overruled.

To which ruling of the Court the said plaintiff then and there and in due form of law duly and properly excepted.

This conversation occurred, I think, in 1889. On another occasion I heard the Judge speak of this matter; it was prior to that, but I cannot give any date; I have nothing to go by, and I took no further notice of it then the conversation itself; but I remember well being in the basement of the bank; perhaps the year prior to the former conversation. I heard a conversation at his house, in which he said the bank would be Andy's; that he intended to give the bank to Andy. I had been joking him at the time and telling him that he had not long to live; that he could not steady his hand, and that he would soon be dead, and that he ought to make a settlement of those things before that time came, and so on, and that is how it came about. This is the import of what he said. I could not, of course, go into details.

W. W. McCRACKEN, a witness on behalf of defendants, also testified:

That he lived in Butte and had lived there continuously since '86; was there prior to that time a few years and left again. I have been in the banking business ever since in Butte, and am in that business now in the Silver Bow National and am president of it. I knew Judge Davis during his lietime; was personaly acquainted with him since the fall of '80, probably, and knew him by reputation a great many years prior to that, and know the First National Bank of Butte; was in its employ as bookkeeper, I believe, in January, '83, and stayed with it up to September, '83. I think in the latter part of

August, '86, I returned and was in the employ of the First National Bank of Butte continuously until, I think, in March, 1890, or perhaps February, 1890. I left—to the Judge's death, probably a few days before. I was very intimately acquainted with him and very well acquainted with young Andrew J. Davis, commonly called Andy, very intimately, and have known him since I returned to Butte in August, 1886. He was in the employ of the bank at the time I went back there.

Here the following question was propounded to the witness by the defendants:

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for Andy? And if you did, state when and where and what you heard him say about the matter.

To which question the same objection and ruling of the Court and exceptions to the ruling of the Court were had as heretofore stated.

A. On enumerable occasions from the time I went there last—in '86 until I left there I very often heard him say—indeed it was almost a daily conversation and subject of conversation. He would talk about the business in general and frequently, times without number, said in fact that the bank was Andy's and he considered it Andy's and wanted it so considered. On several occasions I remarked that there was giving the boy a good deal of money and the Judge would say that he was not giving him much—a hundred thousand dollars and what it earned. He did not look at it that he was giving him more than one hundred thousand dollars. I spoke to him

several times about making the dividends and getting rid of the undivided profits, and he said, "No; I will never do that. I will—take a cent out." He said it all, this was bearing on matters having reference to Andy, in regard to the amount of what he proposed to give Andy.

By the COURT.—Well, just take what he said with reference to Andy.

By the WITNESS.—The Judge told me, in other words, that the bank was to be Andy's when he was gone —it was Andy's; the whole business—all of the capital stock of the First National Bank.

(By Mr. TOOLE, counsel for plaintiff.)

Q. When he was going where?

By the WITNESS.—Well, when he was dead. That was the idea—when he was gone. He wanted it understood by me that the entire business was to give everything. He did not specify that there were just so many shares or how many shares of stock was to go, but the entire bank was to be Andy's.

By Mr. DIXON.—What did you ever hear Judge Davis say with reference to Andy's business capacity and character?

A. He had a very high opinion of him. He said he was a bright young man and was intellectual and honorable, honest, and industrious.

CHARLES ELTINGE, a witness on behalf of defendants, testified:

I reside in Butte and have resided there since '81; am in the insurance business and have been engaged in the banking business here; was with Clark Brothers from

'81 to '89, or Clark & Laribie most of the time. I know the institution called The First National Bank of Butte; been acquainted with it since I first came to Montana, in '81; knew Andrew J. Davis, commonly called Andy, and have known him since '81, and have known Judge Davis since I first came here. I met him almost every day. My duties called me to The First National Bank every day, at least, and I met them in that way.

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for Andy? If you did, state when and where it was and what the Judge said and the circumstances of the conversation.

To which question the attorneys for plaintiff interposed the same objection as heretofore, and the same ruling was made thereon by the Court and the same objection duly taken.

A. In '88 I think it was. I remember one talk I had with him, though there were conversations besides that. I was called to the bank one afternoon after the doors had closed at three o'clock to make the exchanges, and it often happened that I was there a half an hour or so with nothing to do, waiting for the other clerks to get their business done, and would engage in conversation with the Judge. At the time I speak of Andy was sick and at the springs. The Judge said he had a very high opinion of Andy, and thought that he would make a good banker in time. This happened several times, but this particular time I remember because Andy was sick. In this conversation he remarked that he had a very high opinion of Andy and that he was progressing nicely.

Q. What did you hear Judge Davis say at any time as to what disposition he intended to make of The First National Bank or his stock in it in the event of his death?

To which the same objection, the same ruling of the Court, and the same exceptions to the ruling of the Court were made.

A. This time he told me he intended to give Andy the bank and he hoped that his sickness would not amount to anything, because he wanted him to be well before taking charge of it; because he wanted before he dies—he intended to give him the bank; he wanted him to be a healthy man; that was about his idea.

J. E. GAYLORD, a witness on behalf of the defendants, testified:

I have lived in Butte and have resided here since the fore part of '83, and am manager of the Parrot Silver & Copper Company. I know The First National Bank of Butte and have known it since '83, and knew Andrew J. Davis, commonly called Judge Davis, during his lifetime. I became acquainted with him in February, '83, and knew him up to the time of his death. I was quite well acquainted with him and had business transactions with him since that time during his life. I know Andrew J. Davis, commonly called Andy. He is my son in law. He has been my son in law since September or October, 1890.

Q. Did you at any time hear Judge Davis say anything as to the capacity or character of Andy Davis or as to his, Judge Davis', affection or liking for Andy? If you did, state when and where and the circumstances of the conversation and what the Judge said in reference to it.

To which question the same objection was interposed and the same rulings of the Court overruling the same and exceptions to the ruling of the Court had and taken as heretofore.

A. I have heard him frequently express his confidence in Andy's application to business and business integrity and pleasure, with the manner in which he was taking hold of the business, on more than one occasion, once particularly before, I remember, in September, '87.

Q. Did you ever at any time hear Judge Davis say anything as to what disposition he intended to make of The First National Bank of Butte or his stock in it in case of his death?

Same objection, ruling of the Court, and exception as as heretofore.

Q. (Continuing.) State when and where and what he said.

A. In September, '87, I had some business with the Judge, and he then stated that Andy would have the bank. There was some other conversation at the time and he expressed his satisfaction with the manner in which Andy had conducted matters in the bank. These statements were had on a number of times.

On cross-examination the witness stated the words he used were, "That the bank would be Andy's." He did not state when it would be Andy's. His words were, "That the bank would be Andy's."

He never said anything about when he intended to make the gift nor on what conditions he intended to make it. He just generally stated that it was his purpose to give it to him.

His words were, "That the bank would be Andy's."

He did not say what disposition he would make of this bank on his death. I don't remember that he spoke of his death. The remark came about in this way: I had some business with him and he told me he wished Andy to fully understand all the business of the bank and the transactions, and he called Andy into the bank-room at that time and explained the business to him; the transaction I was having with the bank or was about to have. I went out and called him in myself at the request of the Judge.

GEORGE A. TONG, a witness on behalf of defendants, testified as follows:

I am now living on the Big Hole river; formerly lived in Butte City; came there in '75. I lived all the time up to the last summer and this winter in Butte; am engaged in mining. I know the institution called The First National Bank of Butte, and have known it ever since it started; knew Andrew J. Davis, generally called Judge Davis, during his lifetime, and knew him for five or six years before he came over here, and knew him ever since he came here, up to the time of his death. I did all my banking business with him and was well acquainted with him. I lived right behind him in his office in Butte. I sold him the lot on which he lived. I used to go over there pretty near every evening. I know Andrew J. Davis, generally called Andy, and have known him since '86; before that, even. He was there a couple of years while Mr. Hyde was cashier.

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis or as to his, Judge Davis', affection and liking for Andy? If

you did, state when and where and what Judge Davis said about these matters.

To which *ruling* the same objections, ruling of the Court, exceptions were had and taken.

A. I used to go in there, of course, every morning, and where we were not talking about business the old Judge used to ask my opinion. He thought a good deal of Andy, and used to ask me if I did not think he was a very nice boy lots of times. I don't know what time this was. It was both before and while Mr. Hyde was cashier.

Q. Did you at any time hear Judge Davis say anything as to what disposition he intended to make of The First National Bank or his stock in it; if so, where and what did he say?

To which the same objections, ruling of the Court, and exceptions were had and taken.

A. He said that he was going to give it all to Andy. He told me that at least a dozen different times through Mr. Hyde's administration, and up to the last time I ever saw him; maybe not the last time, but along about there.

Here the deposition of D. L. Balch, Charles F. Mussigbrod, and William H. Heald were offered in evidence.

To which the same objections to similar interrogatories as those heretofore, and the same rulings of the Court were made, and the same exceptions to the rulings of the Court aforesaid then and there duly and properly taken and entered by the plaintiff,

A deposition of WILLIAM H. HEALD, so offered as aforesaid, is as follows:

My name is William H. Heald; I am 30 years old; reside at Wilmington, Delaware, and my occupation is na-

tional bank examiner. I was a national bank examiner during the year 1889; was acquainted with Andrew J. Davis, generally called Judge Davis, of Butte, Montana, and first knew him in August, 1889, and I knew him from that time until his death. I first knew him as president of the First National Bank of Butte. Afterwards our acquaintance was somewhat of a personal nature, outside of his connection with the bank. I knew him as president of the First National Bank of Butte in 1889. I have been acquainted with Andrew J. Davis, generally called Andy, since August, 1889, and up to the fall of 1892. I met him several times a year and know him personally and socially outside of his connection with the bank. He was cashier of the First National Bank of Butte during the entire time of my acquaintance with him. He is known as the nephew of Judge Davis. I know the First National Bank of Butte and knew it during the years 1889 and 1890, 1891, and 1892, during which time I was examining the national banks in Montana.

Q. State whether you ever heard Judge Andrew J. Davis say anything as to his intentions with regard to the said First National Bank of Butte and to the said Andrew J. Davis, the defendant, or as to what disposition the said Judge Davis intended to make of said bank or his interest therein. If you did hear him say anything about these matters, or any of them, state as near as you can when and where it was, and how he came to say anything about these matters, and what he said and what was said by anyone else. If you heard the said Judge Andrew J. Davis say anything in relation to these matters on one or more occasions, please state fully the occasion, circum-

stances, when and where you heard him say anything about these matters, what he said, and how the conversation between you and he occurred, if any such there were, and who was present at any such conversations.

To which question the plaintiff then and there objected; which objection was overruled by the Court, and the same exception to the ruling of the Court taken and entered as hereinbefore set forth.

A. On August 12th or 13th, 1889, I was sitting in the back room of the First National Bank building talking to Judge Davis, and, among other things, we were discussing Andy Davis, and I stated to the Judge that the— for Andy were great and for such responsibilities he was not getting much money. The Judge replied, "That will be all right, as Andy some day will get the bank, anyway." Afterwards, in October, 1889, I saw Judge Davis at his house in Butte City. His health at that time was failing, and in the course of general conversation he repeated the conversation of August previous, that Andy should have it all when he, Judge, was gone. At neither time was anyone present but ourselves, although, in October, D. A. Flowerree was with him part of the time, but not when we were talking on that matter. I know nothing more.

E. E. BALCH, a witness on the part of defendants, testified as follows:

I am the assistant cashier of the Omaha National Bank, and had a general supervision of the outside banks connected with the bank during the year, and traveled a good deal over the west, including Idaho, Washington,

Oregon, and Montana. I knew the institution known as the First National Bank of Butte; knew Andrew J. Davis, commonly called Judge Davis; knew Andrew J. Davis, commonly called Andy Davis; knew them in Butte, Montana, during the year 1886; knew them by meeting them at the bank. I knew the Judge about three years before his death. I had no business relations with him, except as business came up between the two banks—I mean the bank of which he was president—the First National Bank of Butte—and the bank I represented in Omaha. I was out several times between 1886 and 1889, and generally saw him while there; saw him sometimes on business matters and sometimes socially. I have known Andy ever since the bank commenced doing business. Judge Davis was president of the bank and Andy cashier.

Here the same objection, ruling of the Court and exceptions to the ruling of the Court with reference to interrogatories pertaining to the same matters as hereinbefore had were had.

I met Andrew J. Davis some time during the month of November, 1889, on the same boat, going from Tacoma, Washington, to Victoria, at which time I talked with him relative to the stock of the First National Bank of Butte. We were together nearly all of one day on the boat referred to, and he told me during the conversation that his health was very poor, and that he had started to take a trip to Japan, hoping to improve by the sea voyage, but that he did not know whether he would be able to continue or not, as he was feeling very poorly. We talked over the business of his bank several times during the day, and during the conversation he stated that — had

built that bank up by his own personal efforts, and had made it the best bank in Montana, and had a great deal of pride in it, and had trained his nephew Andy to the business, so that he could take sole charge of the bank after his death, and when he got home he expected to give over control of the bank to him. I asked him if he intended by that to give the stock of the bank owned by him *and* Andy, and he said that was his intention; that Andy should eventually be the manager of the bank, and that he should leave his stock in said bank to him. He talked over this matter several times during the day, and told me twice that he intended leaving to his nephew when he died the stock held by him in the First National Bank of Butte.

CHARLES F. MUSSUGBROD in his said deposition testified as follows:

My age is seventy-nine years and three months, and my residence is Warm Springs, Deer Lodge county. I was acquainted with Andrew J. Davis, generally called Judge Davis, during his lifetime, and think I first knew him in 1865 and knew him continuously up to the time of his death. We were on very friendly terms. I am acquainted with Andrew J. Davis, generally called Andy, and have known him ever since he came to Montana. He is a nephew of Judge Davis and was always in the bank with Judge Davis. I know the banking institution known as the First National Bank of Butte and have known it ever since it started.

Q. State whether or not you have heard the Judge, Andrew J. Davis, say anything as to his intentions with

regard to the said First National Bank of Butte and to said A. J. Davis, defendant, and as to what disposition the said Judge Davis intended to make of said bank or his interest therein. If you did hear him say anything about these matters, or any of them, state, as near as you can, when and where it was and how he came to say anything about these matters, and what he said, and what was said by anyone else at that time.

To which the same objection, same ruling of the Court, and same exceptions to the ruling of the Court as heretofore were had and taken.

A. Yes; I had a conversation with Judge Davis. The first of August, 1888, Andrew J. Davis came down to the springs—I mean young Andy—and he was at that time a very sick man. He remained in bed until the 16th of August, on which time I came up to Butte. While walking along Main street here old Judge Davis stood in front of the bank and called me in. He asked me, "Well, when will that boy be able to come up?" My answer was, "He is a very sick man. He is worked out and has not the constitution to work in your bank from morning till night." Judge Davis remarked then, "Oh, well, Dr., you know that—that we all had to work when we were young, and especially if a man works for himself." My remark was then, "Judge, as far as I know, he is not working for himself, but for you, and at very small wages at that." Then the Judge says, "Andy knows very well that that bank will belong to him some day."

That is all I can say about it, and that is every word that was used.

CHARLES S. WARREN, a witness on the part of the defendant, testified as follows:

I have lived in Butte 17 or 18 years. I know the First National Bank and its officers, and have known it ever since its organization; knew Andrew J. Davis, generally called Judge, since 1866, and had charge of his business here for a number of years, from '77, more or less, up to his death, and saw him very frequently. I know Andrew J. Davis, the defendant, commonly called Andy, and have known him since he came to Montana.

Q. Did you at any time hear Judge Davis say anything as to the business capacity or character of Andy Davis, or as to his, Judge Davis', affections or liking for Andy? If you did, state when and where, and what you heard the Judge say about these matters.

Same objections, ruling, and exceptions.

A. About a year, or perhaps a year and a half, before Andy came to this county Judge Davis told me that his brother John had a son named after him, who was cashier or collector of the "Chicago Times," and that he was going to have him come out to this country. In fact, I talked to him two or three times before Andy came here. He said that he was about 16 or 17 years old. I asked him what he would do with him, and he said he would put him in the bank, and if he showed a disposition to become a banker, or ever became one, that he would bring him up in the bank and give him a working interest in it. Before Andy came here he said he had been to Chicago, or had been to New York and stopped off at Chicago, and seen Mr. Story, of the "Chicago Times," about the boy, and he referred him to the business manager, and

he said he gave him a good name, and he thought he was the brightest of his brother's sons, and being named after him, he wanted to do something for him. I have talked with him often about his business qualifications, and I used to come down to his place on business matters and he was always very inquisitive about other people's business as well as his own.

Generally discussed everybody, but talked about Andy. He said he was getting along nicely and just such a man as he had long needed. This was during the years from '84 up to near the time of his death.

Q. Did you at any time hear Judge Davis say anything as to what disposition he intended to make of the First National Bank stock or of his stock in it; and, if so, what did he say, when and where, and what were the circumstances of the conversation?

Same objection, same ruling of the court, and exception.

A. He said he had established the First National Bank of Butte and he wanted to build it up as the leading bank of the State, and he wanted it to remain in the Davis family and in the Davis name and under Davis management, even after his death. I never heard him say that he expected to die; that was the farthest from his mind, but he said "He expected the bank to fall to Andy when he did die."

The inference I got from him was that he expected, under his management, to control the bank until he died, when it should go to Andy. That was the substance of it.

Here the defendants introduced also the inventory and

appraisement in the matter of the estate of Andrew J. Davis, deceased, for the purpose of showing the value of the estate outside of this bank.

Which was objected to as immaterial.

Which objection was overruled and said inventory admitted.

To which ruling the plaintiff then and there duly excepted.

Which said inventory, supplemental inventory, and appraisements, marked Exhibits "A" and "B"—admitted in evidence.

And which said inventory and supplemental inventory showed the estate of said deceased, aside from the stock of said bank, to be to the value of two million four hundred and eighty-nine thousand three hundred and ninety-three and eight-hundredths ($2,489,393.08) dollars, Said inventories did not include the bank stock in controversy in this action, nor two hundred and sixteen thousand ($216,000) dollars of bonds and ninety thousand (90,000) shares of the stock of the Butte and Boston Mining Company, nor eight hundred (800) acres of improved land in Davis and Van Buren counties, Iowa, the same not having come to the hands of the administrator of said estate.

Hon. HIRAM KNOWLES, judge of the circuit court, ninth circuit, for the district of Montana, a witness on behalf of the defendants, testified as follows:

I reside in Missoula, Montana, and am United States district judge for the district of Montana, and have resided in Montana since August, 1869; was here in 1866, but left for a time. I have been continuously in Montana since 1868. I was acquainted with Judge Andrew J.

Davis in his lifetime; got acquainted with him some time long about '70; might have known him before. I knew Judge Davis before I came to Montana. The last five or six years of his life I was quite intimate with him; perhaps as intimate as anybody was with him. I was his attorney during the last 6 years of his life. I remember the time of his death, but cannot say exactly when it occurred. It was about March 11th, 1890, as suggested by counsel. I know that he was sick here in February, but I could not have told exactly the date that he died. I was acquainted with his physical condition prior to his death. When he came home from what he called the sale of his Silver Bow property—I don't remember just when it was—he was very much out of health. He was not very well before that time; was very sick afterwards and remained out of health. I know personally and from others and from what he told me that he was taking medicine all the time—that is, every day or two; he was taking medicine after that time. A few months before his death, in November, Mr. Dixon here was sick and had some damaging symptoms at that time. I had known Mr. Dixon from boyhood, and I proposed to him in November, 1899, that we go to Puget Sound. I wanted to go to Puget Sound, and I thought that was the best thing for him to do, so as to get out of this altitude. I went to Judge Davis and told him that I was going with Dixon. I had some papers to make out for him in a lawsuit, and as soon as I named it he said he wished to go along, and I said all right. I didn't know at this time that he was much out of health until we made this trip, when I ascertained he was troubled with insomnia very much, and on

the road from here to Tacoma he slept very little. He had the annex of the state-room; Mr. Dixon and his wife had the state-room, and we had the annex. Judge Davis slept in the lower berth and myself in the upper berth. I would often find him up in the night, and he would get up sometimes before I would, when he would get up and dress himself and sit on the side of the bunk below. When we got to Tacoma he would not go anywhere, and even to his meals, until I went with him, and I found that he was very feeble at that time. Then we went from there to Victoria, and I think we stayed in Victoria eight days. Mr. Dixon and his wife and Judge Davis and myself took a ride every day we were there, I think. I don't think there was a day we did not take a ride, and I thought he improved some. He got uneasy and wanted to leave there after he had been there three days, but I told him I thought he was doing pretty well. He was continually taking seidlitz powders, and we tried to get him to change from taking seidlitz powders to porter. After drinking a couple glasses of porter we considered that that would not do and went and got him a drink—half-and-half and he tried that for a few days and then quit and would not drink any more. I remember one incident: The sun had come out. It had been raining most of the time we were at Victoria, and he started off for a walk. The sun was shining bright and we went with him, and we went about a half a mile straight out from the Draiad house, and the old gentleman came very near giving out. He had to sit down where the board walk was up some distance; we had to stop and sit on that board walk, and when we got back he went and laid down

on his bed and claimed that his meals were sour and so on. We left there and went back to Tacoma, and I think we stayed in Tacoma 3 days, when we went back; I think we went up to Shelton. I had not slept very well and I came back, and the night I came back he was sick in the night. He rang the bell for my room, but I did not wake up and he came and woke me up. I went into his room and he was in considerable pain with his stomach, and I think—I don't know whether his bowels were in order or not, but his stomach. I got some medicine for him. I think I got some pepper-mint down at the bar, and I went and stayed with him that night, and he was quite feeble and he wanted to go back to Montana right away, and would not wait another day. I think that there had been an agreement while I was gone, and he was determined to go right back to Montana. We came back from here and I thought he was better, but he seemed soon to go down again. I should say it was mostly nervous derangement which caused this physical disability. Of course, part of this I can only tell from what he told me, and that is that he did not sleep. He would not sleep only one night in three, and he worried about little things. I remember sending down one morning and he had been awake and thinking that some one was going to swindle him that he had trusted, and he had not slept all night. I said, "What in—is the matter? Supposing you had lost fifty thousand dollars?" He said, "It don't make any difference whether it is fifty thousand dollars or two hundred and fifty dollars. I will worry about it just the same. I cannot keep from doing it. My mind is not subject to

my control at all about the matter." I was a pretty busy man in court in those days and had a lot of business in Deer Lodge, and I think he had seen Van Sant. Then he got a notion that he would like to go to the south of France and stay awhile and he offered to pay my expenses if I would go with him. I told him I could not go, there was no use talking, and then it was finally agreed that he should go to Mexico. I recommended that for the reason that he would see a different kind of people as well—have a change of climate. He would see different houses, different roofs on the houses and I thought that would distract him, and my understanding was, when I went to Deer Lodge that he was to go to the city of Mexico. We got back to Butte in December—about the 1st of December. We were eight days, I think, in Victoria, and at the time we got to Tacoma we stayed there two or four days. Then we spent a day going to Victoria and a day coming down, and then must have been as much as three days at Tacoma coming back. Then there was the time we were traveling to and from Tacoma. Well, altogether I would say we were there nearly three weeks. I have not looked at the dates or anything of that kind. We got here in December I know, because of the court at Deer Lodge. I had to be there. Think after he came back here in a day or two he got down just the same as he had been before we went down there. I was with him whenever I was there. Most always he would see me at the bank or send for me for some little thing to come down to his house. Sometimes it did not amount to anything and sometimes it was a matter of business. I would say that he declined or went back just as he was

before—sleepless nights and all and in about the same condition taking medicine every day or so. I was not here at the time he left on his last trip. I met him in Deer Lodge on his return. He must have returned some time along in February—about the 1st of February—from his second trip. It was about a month before he died. When I saw him in Deer Lodge he had failed considerably. Of course, we were in the cars and he talked very low, and it was with difficulty that I could understand his talk in the cars. I had to get right down to him. He seemed glad to see me and talked a good deal. His mental condition, I thought, was perfectly sane. I thought I saw him in Butte after his return from Tacoma the second time, in February. I came up with him from Deer Lodge, and he seemed feeble and very low. He kept talking to me a good deal, but I don't think I understood all he said to me coming up. I went with him to his room that night with Andy Davis, and he said to me, "I want to see you to-morrow," and I went to see him the next day. His physical condition was bad. He had lost ground since I had seen him. There were some days he would think he was liable to die in a very short time, and other days he would think he was liable to live as long as his father. He used to always cite how old his father was when he died. His father was 84 years old, I think, and he did not see why he could not get over his sickness and live as long as his father. He had a sort of belief that he had inherited a long life, and it was one day one thing and another day another. At this time when he went up to Tacoma and some time before that he was all the time trying to straighten up his affairs, as he

claimed, and fix up everything in the bank. He would go into the bank and take out the bills payable to the bank and look over them and examine them all, and those that he did not think were just right he wanted them fixed up. He wanted everything fixed up, he said. That was before he went to Tacoma and afterwards. He did not state to me for what reason he wanted them fixed up. You must remember that Judge Davis was a remarkably reticent and secretive man about himself and his affairs. He was a very good talker about other people's affairs, but he was a very secretive man about his own affairs and about himself. I did not see him just before his departure for Tacoma, in December. I know Andrew J. Davis, commonly called as Andy, and have known him ever since he came into the bank. I don't remember just when that Judge brought him on.

Q. Can you state, Judge, the opinion of Judge Davis, of Andrew J. Davis, Junior, as to his business capacity and as to his affection towards him?

Same objection, ruling of the Court, and exceptions to the ruling of the Court.

A. Well, he was accustomed to talk long the last about Andy, as he always called him, his business capacity, and in a very characteristic way. He would pump me as to my opinion about him, and then he would compare him to himself. He would say, "Now, I was just a little fellow just like Andy, and he will come out all right."

This was owing to the fact that Andy's father was all the time saying, "Andrew, you are killing Andy. You are putting too much on him, and you are going to kill him." The old Judge would say, "You just let that boy

alone; he has got more business sense than you have got. Now, just let him alone; he is coming out all right." Of course, I know he had a good opinion of his business capacity or he would not have put him in as cashier of the bank. "As to his affection, I think that Andy is the only person that I ever knew Judge Davis to exhibit any particular warmth or affection towards. He was a man that had few friendships, and Andy was one of his particular favorites. If he was sick he was always uneasy. He was sick in the bank here once. He had a room in the bank, and the Judge would go in and look at him, and he would not say anything particular to him, but he would rush right off and see the Dr. and ask him about what he thought of Andy and ask if he was very sick or something of that kind, and he seemed to feel differently towards Andy than to any one else that was around him."

Here the witness was permitted to testify with reference to such matters as he did not consider professional or that he had obtained in a professional way, subject to the objection, ruling of the court, and exceptions as heretofore.

A. Judge Davis was quite sick, and I had gone in there and talked with him about his trip and his health, and he said, "I wish to make some presents." He went on and stated that he wanted to know if I thought he was sound enough in mind to make these presents, and he had a long talk about any probability about his going insane, and I went on and discussed with him what I had read on these subjects of insanity and brain diseases. The conversation was probably an hour long, and in this

conversation about the presents he first said he wished to give ten thousand dollars to the public library of Butte, Andy wanted him to, and he understood that Charlie Larabie had given ten thousand dollars, and he wanted to give ten thousand dollars to meet that. Then he said there was a lady here whose husband had helped him considerably, and he wanted to make her a present, though he said he had paid him for everything that he had done, that he asked, but he wanted to make her a present. He said something about W. E. Wehtsraur's little girl, but exactly what was said about that I don't remember. Then he said there were two persons in the States that he wanted to make presents to, and in this conversation he said, "Andy is to have the bank, or control of the bank." I don't know which now; or he might have said both. That was all that was said particularly about Andy in that conversation—that is, as far as that matter is concerned. The balance of it led up the a legal matter. The interview was to be renewed. He was not to attend to any business or go up to the bank or anything of that kind. and in three days from that time I was to be there and we would straighten up his affairs. I went back at the second time. At that time he was insane. He would have done anything that I said. He would have signed any paper or anything like that, but he was out of his head, discussing business in a very philosophical way, giving his views about running banks and everything of that kind, and how they should be run, some of which views I think would be pretty good for some men to follow now.

Q. In this conversation with reference to Andy did he say that he wanted to give the bank to Andy?

A. He did not. He said, "Andy is to control the bank," or "to have the bank," and I think he may have said both, because this conversation was fully an hour long, and I don't know but more. He never was sane afterwards, and died of this illness.

Q. What have you to say with reference to Judge Davis dying with the same illness that he had there up to your trip to Tacoma with him?

A. While that is really in the line of a medical question, if you should ask my judgment about it, I should say that that disease started on his return from the sale of the Silver Bow properties to Butte and Boston company.

When he came back it was a week before we could find out what he had actually done, and I had to write a letter to Mr. Beaman, of New York. Before I had got that letter he had straightened out and he told me that he had had a chill somewhere in New York at that time, and he came back very feeble. He never gained his strength after that time. That was after he came back. I don't remember the day. I think it was about a year before his death.

Cross-Examination.

(By Mr. TOOLE.)

Q. This conversation that you refer to in which he spoke of giving Mrs. Wehrspaun's daughter something, and also to the library ten thousand dollars, and also something to the lady here, and also that Andy was to have the bank or control the bank, was after his return from Tacoma, was it?

A. The last time; yes. It was his last trip to Tacoma.

Q. I believe you say that it was understood that you were to return within a few days and fix up these matters for him?

A. No; it was not to fix up those gifts exactly. The return was with a view of writing a will and fix everything in that way.

Redirect Examination.

(By Mr. DIXON.)

Continuing, the witness said: My object for returning then was to draw a will. That was the legal matter that came up. The other matter was my opinion as to his physical condition and capacity to make these presents that he was going to make.

(By the COURT.)

Q. I would like to ask the witness a question about his statement if there is no objection to it on the part of the counsel?

Consented to by all parties.

(By the COURT.)

Q. The statute provides that an attorney or counselor shall not, without the consent of the client, be examined as a witness as to any communications made by the client to him or his advise given thereon in the course of professional employment. The question I desire to ask is whether or not the statement which you say Judge Davis made to you with reference to Andy and the bank—in other words his statement that Andy was to have the bank or was to have the bank and control the bank—was

made in the course of professional employment by you with Judge Davis.

A. I did not so consider it, Judge, and I made no charge for it. I considered it was a personal matter, arising out of the personal relations that had existed. I may say it became very difficult along to the last in my intercourse with Judge Davis to distinguish between what would be personal and what would be a matter of attorney, because he came and talked to me about a great many things that pertain not at all to business, legal business, or required any looking up in legal matters. Now, the fact of his going with me down to Tacoma and I looking after him and everything of that kind could not be considered a legal matter, but a personal matter, and this interview with him I made no charge for, and I always charged him for everything. If I drew up a deed or a power of attorney or anything, I made a charge for that.

(By the COURT.)

Q. Do you know, from anything that he said, whether he considered that he was consulting you at that time with reference to this particular matter which I have inquired about in the capacity of an attorney or in the capacity of a friend?

A. No; he was consulting me, undoubtedly, in the capacity of a friend, to give him an opinion as to his mental capacity at the time to make these presents. It was not a legal matter; there was nothing said in any way, shape, form, or manner about how to make these presents. The truth is that I didn't want him. You may say that I was anxious that Judge Davis should fix up his

matters with a will at that time, and it led finally up to that proposition.

(By Mr. FORBIS.)

Continuing, the witness said: He did not ask me about a will or making any will, but it was about making these gifts, and whether I thought he was mentally capable of making these gifts.

By Mr. TOOLE.--We have no desire to interpose any objection to the testimony on account of the relation of attorney and client, and we withdraw all objections already made on that account.

By Mr. TOOLE.—We desire to ask Judge Knowles a question on our own part, and as he desires to go away, by consent of Court and counsel we will do it now. It is simply for the purpose of proving this proxy and having it identified by the witness.

Here the proxy of Judge Davis to John E. Davis was identified and was considered thoroughly identified for the purpose of being admitted in evidence by agreement of counsel.

Q. Take this proxy. Do you remember that meeting of the stockholders on the 14th of January, 1890? I mean the first stockholders' meeting that was held after Judge Davis left on his last trip to Tacoma?

A. I don't remember about the meeting, but suppose the minutes will show what was done and whether I was there. I am not sure that I was there.

Here the witness was handed the proxy of Judge Davis to John E. Davis, authorizing him to act as his proxy at any stockholders' meeting of the bank, and the witness stated that it was Judge Davis' signature to the proxy

and said, I am president of the First National Bank of Butte.

W. C. DARNOLD, being a witness for the defendants and being examined by J. W. Forbis, one of the attorneys for the defendants, testified:

I reside in Butte and have been here and in the vicinity of Butte for about 8 or 9 years, for the last six months. I resided here before coming here in 1883 and went to work for the First National Bank of Butte. I commenced on the 29th of August, 1883, and quit on the 26th of August, 1886. I was acquainted with Andrew J. Davis, commonly called Judge Davis, during his lifetime. I knew him from that date up to his death. I was in his employ for three years, just mentioned in the bank, and subsequently in his employ in connection with J. R. Boyce, Jr., and Company as bookkeeper. I was quite well acquainted with him. I remember his return from Tacoma in 1890. I saw him after his return and had a conversation with him relative to Andy and the First Nation Bank.

Same objections, same ruling of the Court, and same exceptions to the ruling of the Court entered as heretofore.

I made an application to him for a place in the bank, in which he told me, knowing that I was an enemy of Andy's—then, he says, well, I lost my position with J. R. Boyce & Co., and I says I was out of my position and out of money. The Judge had always been very favorable to me when I was in his employ and I thought I could get back in the bank, so I made application to him somewhere between the 1st and the 6th of Febru-

ary. At that time he told me that he had given the bank stock to Andy Davis and had not any control over it. Knowing that I was an enemy of Andy's, he said he could not do anything, but he said when he got up he would help me. He did not say he would put me in the bank.

(By the COURT.)

Q. When was this?

A. Some time between the 1st and the 6th of February, 1890.

(By Mr. FORBIS.)

Q. What was the Judge's condition at that time?

(By the WITNESS.)

A. He was very low, very weak. He could only speak two or three words and would keep quiet for a moment or two, and then would speak again, rather insinuating to me by what he said that I had better make my interview short.

Q. State what he said.

A. Well, he said he was not strong enough to talk much, and that he would do something for me when he got up, and then he subsided, and then did not say anything more.

It was just about the time of his return. It was a very few days after his return. It may have been 4 or 6 days. The interview lasted a few minutes, probably not over 15 minutes—10 or 15 minutes.

Cross-Examination.

(By Mr. TOOLE.)

Continuing, the witness said:

I don't know the dates; I only judge from the fact that my last work with J. R. Boyce, Jr., & Co. was the 31st of January, and it was after that time, because I was discharged but very shortly afterwards, because I made this application just as soon as I was discharged. I was in his house on Broadway. I could not say exactly what time—some time in the fore part of the month.

Q. You know if for the reason that you immediately after you ceased your employment with J. R. Boyce & Co.—you called there to see him with reference to this object that you wanted?

A. To this situation back in the bank again, where I had been. There was a lady there at the time. I think it was Mrs. Wehrspaun; she let me in. I don't think she remained in the room at the time of this conversation. She may have been in, but I did not pay any attention to her until after I went in the room. The Judge had only been back here a few days, cannot say how long, when this conversation occurred; probably four or five days, maybe less. I don't know what time of day it was it occurred; it was during daylight. I am not sure whether it was in the forenoon or afternoon; cannot say whether it was after the shades of evening had come on, but it was during daylight—bright daylight—because it was not dark or anything of that kind. I think Mrs. Wehrspaun was in there at the time the conversation commenced. I am not certain that it was Mrs. Wehrs-

paun. It might possibly have been her daughter or somebody else. He said he had given the bank stock to Andy or the bank business to Andy, and that he hadn't any control of the position that I asked for, but that he would do something for me when he got out.

He knew that Andy and I were enemies, you know. I don't know how long it had been before that that Judge Davis had been looking after any of the bank business. He had been gone for a long time. I think about the time he went away he was looking after the bank business—that is, he was in and out of the bank; possibly up to the time that he left. I, being employed about other business, did not know. Prior to my interview with Judge Davis I was in the employ of J. R. Boyce, Jr., & Co. I had been living in the family of Mr. Boyce. I had been stopping at Mr. Boyce's and sleeping there and eating there sometimes, and sometimes downtown. No one has been paying me anything to remain here. No one has ben paying me anything for any purpose. Mr. Andrew J. Davis has not paid me a cent. I had not received anything from him; not anything at all. He has made no promise to pay me any money. I came back here to Butte about the middle of October—that is, when I came back here last. I have been engaged in on business since I came here; no business at all. I have not been enabled to get in any business. I have been just living with Mr. Boyce. I have not been able to get anything to do. I have always been a bookkeeper. I never told anybody else what had transpired. I never told Mr. Boyce or Mrs. Boyce what had occurred. I never mentioned it to them. I never said anything to them about

what I heard Judge Davis say in reference to that bank or bank stock. I never said anything to either one of them about it. I am positive about that. I had no recollection of doing so anyway.

Q. Did you have any conversation recently with Mr. Boyce or Mrs. Boyce about this matter?

A. Only in a general way—at the table and around the house, but nothing in which I said anything about what my testimony would be.

Q. Did you say anything to them about your testimony being the last and that it would be a clincher or something to that effect; that it was reserved to the last and that it would be a clincher?

A. I don't recollect saying it. If I had said it I would recollect it positively. I have no recollection of saying it.

Q. Would you recollect it if you had?

A. I think I ought to, but I don't recollect it.

Q. Will you say you did not say it?

A. No; I won't say I did not say it, because I don't recollect of saying it.

Q. Did you tell Mr. Boyce about expecting to receive anything for staying here? A. No, sir.

Q. Nothing of that sort? A. No, sir.

Q. Mr. Darnold, did anybody push you out of the house there at that time when you had this conversation that you speak of?

A. Push me out of the house? No, sir.

Q. Are you sure of that?

A. I am sure of that; nobody pushed me out of the house. My intimation was Judge Davis was not able to talk.

Q. Did you say to Mrs. Boyce that when you were having this conversation with him somebody pushed you out of the house? A. No, sir.

Q. Or out of the room? A. No, sir.

JAMES A. TALBOTT, plaintiff, recalled on behalf of the defendant testified as follows:

I am familiar with the stock of the First National Bank of Butte—the certificates, I mean. The certificates you hand me are certificates of stock of that bank.

Q. Do you know the signatures—A. J. Davis and A. J. Davis, Jr.? A. Yes, sir.

They are their respective signatures and this is the seal of the bank to them. There is some here, I see, that Mr. Hyde signed. These are the same certificates about which I testified upon yesterday. I testified upon yesterday that these certificates had a blank transfer assignment upon the back. I thought then they had, but see now that they had not.

Here the certificates offered in evidence by the defendant, being certificates of stock of the First National Bank of Butte—certificate No. 10,481 shares; certificate No. 14,343 shares; certificate No. 22,116 shares, all signed by Jos. A. Hyde cashier, and A. J. Davis, president; certificate No. 25, 10 shares, signed by A. J. Davis, Jr., cashier; Andrew J. Davis, president.

(Here insert the certificates of stock.)

If I testified upon yesterday that Judge Davis was in Butte from September until he went to Tacoma a day or two after the conversation between him and Andy about the stock, it was a mistake, because he went down with Judge Dixon and Judge Knowles between September and

that time. It must have been in October or November some time that he went down.

JOHN E. DAVIS, a witness on the part of the defendants, testified as follows:

I reside in Butte and have lived there since 1884; am a brother of Andrew J. Davis, the defendant in this action, and a nephew of Judge Davis. I attended a meeting in January, 1890, of the stockholders of the First National Bank of Butte and voted the stock as proxy for Judge Davis.

Looking at the proxy, the witness says; This is the proxy made out that time and which I voted. I voted it at that meeting and under the proxy.

Q. For an election of officers or directors?

A. Directors, I think.

Q. By whose direction or at whose suggestion did you vote for these officers?

By Mr. TOOLE.—We object as improper and incompetent.

By Mr. KIRKPATRICK.—We introduce this proxy for two purposes: to show that the date of it antedates the date of the alleged gift, and also to show that the actual domain of the stock was exercised by the beneficial and equitable owner of the stock, Andy Davis instead of, as the plaintiff claims, by the owner of the legal title.

By Mr. DIXON.—I would like to offer the proxy in evidence.

Which proxy was admitted without objection and is marked Exhibit "C."

PROXY.

"I do hereby constitute and appoint J. E. Davis, of Butte city, in the county of Silver Bow, State of Montana, my lawful proxy for me and in my name to vote nine hundred and fifty shares of the stock of the First National Bank of Butte, owned by me and standing in my name on the books of said bank, at the annual meeting of the stockholders thereof to be held for the election of directors on the fourteenth day of January, A. D. 1890, pursuant to law. I hereby ratify and confirm whatsoever the said J. E. Davis may lawfully do by virtue hereof, and I hereby revoke and annul all authority heretofore given by me authorizing any person for me or in my name to vote any of the stock in said bank.

In witness whereof I have hereunto set my hand and seal this 24th day of December, A. D. 1889.

(Signed) A. J. DAVIS."

Objection to last question overruled; to which ruling of the court the plaintiff then and there duly excepted; which exception was duly and properly entered.

A. At Andy's.

By Mr. TOOLE.—I will ask that that answer be stricken out for the following reasons:

1st. There is no authority to vote the stock under the laws of the United States and the by-laws of the bank except that given by the deceased in whose name it stood upon the books of the bank.

2d. It does not appear that the attempted control of any one else or the assumption of the agent to act under

the proxy for any one else was known to or acquiesced in by the deceased so as to be binding upon him in his lifetime or binding upon his executors or administrators.

3d. Because the assumption so to act is based upon the declarations or request of A. J. Davis and not in the presence or hearing or knowledge of the decased, and is not binding on him or his executors or administrators.

4th. It is not admissible as an act of Andy's on his own behalf, because inconsistent with the power conferred under which the act was done.

The said motion, being considered by the Court, was overruled, and to which ruling of the Court in not striking out the said answer and testimony of said John E. Davis with respect to instructions given him by Andy the said plaintiff then and there duly excepted, and his exceptions were duly entered according to law.

I never had any conversation with Judge Davis in regard to this proxy or any direction from him as to what officers and directors I should vote for under it. I received that proxy at the time of the meeting from Andy and voted it, and after I voted the proxy I handed it back to Andy. The body of the proxy is Andy's handwriting.

Cross-Examination.

(By Mr. TOOLE.)

It came into my possession at the bank at the meeting of the stockholders. That as the first time I ever seen it, It was given to me by Andy. I acted under this proxy. I voted the stock that stood in the name of Andrew J. Davis (Judge Davis) under this proxy. I suppose I voted 950 shares of stock, the same as the proxy calls for. I

voted just acording to the proxy. I don't remember for whom I voted for president. I voted the way Andy told me to. I don't remember whether I voted for Judge Davis for president or not. He was not elected at that meeting. This was a meeting of stockholders, as I understand it. I don't remember whether I voted for him for director or not.

Q. This seems to have been filled in there with a kind of purple ink—that is, the name of John E. Davis. In whose writing is that? A. That is Andy's

Q. The signature of Judge Davis also seems to be in purple ink? A. Yes, sir.

Q. In different ink from the body of the instrument, is it not? A. Yes, sir.

Q. Do you know anything about when this proxy was really signed by Judge Davis? A. No, sir.

Q. Do you know whether it was signed in this town or Tacoma and returned here?

A. No, sir.

Q. The date of the proxy is in the same ink as the body of it, is it not?

A. I think so, yes; if I remember right.

The signature and filling in the name of J. E. Davis is in purple ink.

Redirect Examination.

(By Mr. DIXON.)

The body of the proxy is in Andy's writing. The name of J. E. Davis occurs in the body of it in two places in purple ink, both in purple ink and both in Andy's writing, so that the whole body of the proxy is in the same

writing, but my name is in different ink or different colored ink. My name in the proxy is written with the same ink as that of Judge Davis.

Here the defendants, having the affirmative of this case, rested.

Plaintiff offered in evidence the books and minutes of the bank—the deed mentioned by Mr. Talbott—for the purpose of getting at the date of the alleged gift, and the by-laws of the defendant bank were also admitted in evidence.

Which were as follows to wit:

BY-LAWS OF THE FIRST NATIONAL BANK OF BUTTE, M. T.

Adopted at the directors' meeting held in September 12, 1881.

General Form of By-Laws.

1.

The regular annual meeting of stockholders of this bank for the election of directors and for the transaction of other legitimate business shall be held between the hours of ten o'clock A. M. and four o'clock P. M. on the day specified in the articles of association, viz., the second Tuesday in January of each year, and the thirty days' notice of the time and object of such meetings thereby required shall be given by the president, vice-president, or cashier, by publication in one or more papers in the city of Butte. The board of directors shall, within one month previous to the date fixed for such meetings, appoint three stockholders to be judges

of the election for directors, who shall hold and conduct the same and who shall under their hands notify the person acting as cashier of this bank of the result thereof as soon as ascertained and of the names of the directors elect.

2.

The person acting as cashier shall thereupon cause the return made by the judges of election to be recorded upon the minute-book of the bank, and shall notify the directors chosen of their election and for the time for them to meet at the banking-house for the organization of the new board. If at the time fixed for such meetings there should be no quorum in attendance the directors present may adjourn from time to time until a quorum shall be obtained.

3.

The directors elect shall meet for organization upon the notification given in accordance with law 2 within one week from the time of their election, but shall not do any business whatever prior to qualifying by taking the oath of office, as required by law.

4.

If the annual election for directors should not be held on the day fixed by the articles of association the directors in office shall order a special election, of which notice shall be given, judges appointed, and returns made and recorded upon the minute-book, and the directors chosen thereat shall be certified to the cashier and notified as provided by by-laws 1 and 2.

5.

The officers of the bank shall be a president, cashier, assistant cashier, and bookkeeper, and such other officers as may be required from time to time for the prompt and orderly transaction of its business, and all the officers, clerks, and agents shall be elected, appointed, or employed by the board of directors, or with the consent thereof, and their several duties may be prescribed by the board.

6.

The president shall hold his office for the current year for which the board of which he shall be a member was elected, unless he shall resign, become disqualified, or be removed, and any vacancies occurring in the office of the president or in the board of directors shall be filled by the remaining members.

7.

The cashier and the subordinate officers and clerks shall be appointed to hold their offices, respectively, during the pleasure of the board of directors.

8.

The cashier of this bank shall be responsible for all the moneys, funds, and valuables of the bank, and shall give bond, with security to be approved by the board, in the penal sum of twenty-five thousand dollars ($25,000), conditioned for the faithful and honest discharge of his duties as such cashier, and that he will faithfully apply and account for all of such moneys, funds, and valuables, and deliver the same to the order of the board of directors

of this bank or to the person or persons authorized to receive them. The assistant cashier shall assume all the duties and responsibilities of the cashier in his absence, and shall give bond in the sum of twenty-five thousand dollars ($25,000.00) for the faithful discharge of such duties.

9.

The president of this bank shall be responsible for all such sums of money and property of every kind as may be intrusted to his care or placed in his hands by the board of directors or by the cashier, or otherwise come into his hands as president, and shall give bond, with security to be approved by the board, in the penal sum of ——— dollars, conditioned for the faithful discharge of his duties as such president, and that he will faithfully and honestly apply and account for all sums of money and other property of this bank that may come into his hands as such president, and pay over and deliver the same to the order of the directors or to any other person or persons authorized by the board to receive the same.

10.

The bonds of the officers shall be placed in the custody of the stockholders of this bank to be designated by the board of directors, who shall not be one of the bonded officers, to be surrendered by him only upon the order of the board.

11.

The impression made below is an impression of the seal adopted by the board of directors of this bank.

[Seal]

12.

All transfers and conveyances of real estate shall be made by the bank under the seal thereof, in accordance with the orders of the board of directors, and shall be signed by the president or cashier.

13.

Whenever an increase of stock shall be determined upon in accordance with the articles of association of this bank it shall be the duty of the board of directors to cause all the stockholders to be notified thereof and a subscription to be opened thereof specifying the terms of payment agreed upon by the subscribers. Each stockholder shall be entitled to subscribe to shares of the new stock in proportion to the number of shares he already owns, but if any stockholder shall fail to subscribe to such new stock as he may be entitled to or to pay his subscription according to agreement, the board of directors shall determine what disposition shall be made of the privilege of subscribing for the new stock not taken.

14.

This bank shall be open for business from nine o'clock A. M. to three o'clock P. M. each day except Sunday and days recognized by the laws of this territory as holidays.

15.

The board of directors of this bank shall hold regular meetings at the banking-house for the transaction of business on the first Monday of each month, and should that day in any year fall upon a holiday, the regular meeting for that month shall be held on such other day as the directors of the preceding meeting shall order.

16.

The board may also hold special meetings upon the call of the president, cashier, or any three or more members, and whenever there shall not be a quorum at a regular or special meeting the members present may adjourn the meeting from day to day until a quorum shall be obtained, and any meeting may be adjourned from time to time by a vote of a majority of a quorum present, but no business except adjournment shall be transacted in the absence of a quorum.

17.

There shall be a committee to be known as the discount committee, consisting of the president, one director, and cashier, who shall have power to discount and purchase bills, notes, and other evidence of debt and to buy and sell bills of exchange, and any one of the said committee objecting to the discount or purchase of any paper shall be a refusal of said paper. Two of said committee shall be a quorum for discount.

17.

The board of directors may appoint one of its members or an officer of the bank to act as clerk at its meetings.

18.

The earnings of this bank shall be disposed of according to orders of the board of directors made at regular or special meetings, and no dividends shall be paid to stockholders or other disposition of earnings made except upon an order of the board.

19.

The organization papers of this bank, as executed and filed with the comptroller of the currency, the returns of judges of the election and proceedings at all regular and special metings of the board of directors, the by-laws and all changes and all amendments thereof, and the report of all examining committees or directors made according to law 26, shall be recorded in the minute-book, and the minutes of each meeting of the board shall be signed by the president and attested by the cashier.

20.

The board of directors shall have power to prescribe and, when expedient, to change the form of books and accounts to be used in the transaction of the business of this bank and to prescribe in general or particular the manner in which its affairs shall be conducted.

21.

The stock of this bank shall be assignable and transferable only on the books of this bank, subject to the restriction and provisions of the banking laws, and transfer book shall be provided, in which all assignments and transfers of stock shall be made. No transfer of stock shall be made without the consent of the board of directors by any stockholder who shall be liable, either as a principal debtor or otherwise.

22.

Transfers of stock shall not be suspended preparatory to the declaration of dividends, and, unless an agreement to the contrary shall be expressed in the assignments,

dividends shall be paid to the stockholders in whose names the stock stands at the date of the declaration of dividends.

23.

Certificates of stock, signed by the president and cashier, shall be issued to stockholders, and the certificates shall state upon the face thereof that the stock is transferable only on the books of the bank.

24.

All the current expenses of this bank shall be paid by the cashier, who shall every six months or oftener, if required, make to the board of directors a statement thereof.

25.

All contracts, checks, drafts, etc., for this bank and all receipts for circulating notes received from the comptroller of the currency shall be signed by the president or cashier.

26.

There shall be appointed by the board of directors every six months a committee of three members thereof, whose duty it shall be to examine into the affairs of this bank, to count its cash and compare its assets and liabilities with the accounts of the general ledger, ascertain whether these accounts and all others are correctly kept, whether the condition of the bank corresponds therewith, and whether the bank is in a sound and solvent condition, and to recommend to the board such changes in the manner of doing business. etc., as shall seem to be desirable, the result of which examination

shall be reported to the board at the next regular meeting thereafter.

27.

The vice-president shall, in the absence of the president, assume all the duties and responsibilities of the president.

28.

A majority of the directors shall be a quorum to do business.

29.

A copy of the by-laws of this bank, as in force, shall be kept in a convenient place in the bank, to which any stockholder shall have free access during the regular hours of business.

30.

These by-laws may be changed or amended by a vote of two-thirds of the directors.

Butte City, Montana, Jan'y 14th, 1890.

Pursuant to the following notice, published in the "Daily Inter-Mountain," the stockholders of the First National Bank of Butte met in the parlor of said bank this day at three thirty P. M. for the purpose of electing directors to serve the ensuing year.

Annual Meeting.

The regular meeting of the stockholders of the First National Bank of Butte will be held at the office of said

bank on Tuesday, January 14th, 1890, between the hours of ten A. M. and four P. M.

Dated Butte City, December, 9th, 1889.

ANDREW J. DAVIS, Jr.,
Cashier.

Present: Andrew J. Davis, by proxy to J. E. Davis, Hiram Knowles, and A. J. Davis, Jr.

On motion, Hiram Knowles was chosen chairman and Andrew J. Davis, Jr., secretary.

On motion, duly carried, it was resolved to proceed to the election of directors, and Hiram Knowles and John E. Davis were chosen judges of the election, who announced the following directors duly elected, receiving nine hundred and seventy votes each: Andrew J. Davis, Hiram Knowles, S. T. Hauser, W. W. Dixon, James A. Talbott, A. J. Davis, Jr.

The meeting then adjourned.

ANDREW J. DAVIS, Jr.,
Sec'y.

Attest:

HIRAM KNOWLES,
Chairman.

J. R. BOYCE, Jr., a witness on the part of plaintiff, testified as follows: I reside in Butte and have lived here for about fourteen years, and have been at the ranch off and on; call Butte my home, and am acquainted with C. W. Darnold, and have known him since 1868 or '70.

Q. Did you have any conversation with him in the presence of Mr. Wellcome, in Butte City, with reference to what he knew in regard to the statements of Andrew

J. Davis, deceased, about disposing of the stock of bank stock know as the First National Bank of Butte?

A. I was present at a conversation that occurred in the office some time in December, I think it was about 1893.

That is — near as I can come to dates. I was residing at the ranch at the time, and Mr. Darnold was in the office with my father. They were checking up the books in the office of Mr. Wellcome during that month. It was prior to Christmas. I don't remember the exact dates, but it was possibly between the 16th and 25th. I was in there several times while they were checking. The conversation was in the presence of Mr. Wellcome, in this city, in his office.

Q. State what was said to you and Mr. Wellcome — reference to what he knew and expected to testify as a —- in this case.

A. Well, he said that he had heard Judge Davis. That was along in the year 1887. He heard Judge Davis say that he intended the bank for Andy.

Q. Did he say anything about being subpoenaed or expecting to give his testimony in this case on the part of the defendants?

A. I think not at that time.

Q. Did he at any time? A. Recently he has.

Q. How recently?

A. Well, it was only in the last two weeks, I guess.

Q. Did you talk with him within the last two weeks about what he knew about this case? A. Yes, sir.

Q. State to the Court what occurred.

A. Well, he said that he would testify and he would be the last witness to testify in this case.

Mr. DIXON.—We object to this; it is not what this witness was produced for. Mr. Darnold was asked about this before.

—. I will ask you this question, Mr. Boyce: You say you had a conversation with him in this city within the last two weeks with reference to what he expected to testify in this case? A. Yes, sir.

Q. Did he say to you in that conversation substantially that all he knew about this case was what Judge Davis had told him in 1887?

A. That was all he ever stated to me, what he had formerly stated, and that was what had occurred in 1887.

Q. Did he say to you that was all he knew about the case?

A. Well, he didn't state to me what he was going to testify to at all. That was all he gave me to understand he knew about the case.

By the COURT.—You were asked to state his statements to you, not what you understood.

(By the WITNESS.)

A. Well, he said he would be called as a witness, but he did not state, of course, what he would testify to.

(Mr. TOOLE.)

Q. He said he would be called upon to testify?

A. Yes, sir.

Q. Did he say to you what his testimony would be?

A. Not at that time. A. Nor did he say what his

testimony would be, because he did not know he was going to testify until this conversation.

Q. Did he tell you what he knew about this case?

A. He did.

Q. Did he tell you what he did know?

A. That he heard the Judge say that he intended giving the bank to Andy.

Q. When did he say this occurred?

A. That was in 1887.

Q. Mr. Boyce, I will get you to state to the Court how long Mr. Darnold remained in the employ of J. R. Boyce, Jr., as shown by your books and of your own knowledge.

A. He entered our employ in July, 1887, and continued in our employ until the 1st of March, 1890, or about the 1st of March, 1890.

Q. For whom was he employed during the 1st of Feb., 1890?

A. He was in the employ of J. R. Boyce, Jr., & Company, according to his entries on the books?

Q. How, according to your knowledge, then?

A. Well, according to my memory, he was there.

Q. Up to what time?

A. Until the 1st of March, 1890.

Cross-Examination.

(By Mr. FORBIS.)

I was present here during Mr. Darnold's testimony and heard it all, and knew what he testified at that time. I heard all the conversation excepting a very small part of it. I was talking to Col. Sanders during a short in-

terval, but I heard it in the main. I heard Mr. Darnold testify about what Judge Davis told him after his return from Tacoma. I was here during the whole of the trial. I was not subpoenaed as a witness. No subpoena was served on me. I was not present at the request of anyone, but just listening. Mr. Darnold told me that he had a conversation with the Judge in 1887. He never told me that he didn't have any other conversation with him relative to this matter. He simply told me of that conversation. He did not tell me that he was going to testify to anything else except that conversation. When he told me two weeks ago that he was going to testify as to the Judge's intentions I testified to that. He never told me that that was all he was going to testify to. He did not say whether he knew anything else or not. Mr. Darnold left my employ about March 1st, 1890. I recall it from the books. He made all the entries upon the books. He never made but few entries after the 1st of February, and during the entire month, I believe, his entries are not in the books.

Q. There are some entries?

A. No. I think they are all his entries through the month of February and up till about the 7th of March.

Q. Have you the books with you?

A. No, sir. I have them at my house in town.

Q. Did Darnold make any entries in those books after he was discharged?

A. I think not. I am not sure.

Q. Isn't it a fact that Mr. Darnold did come in occasionally and make entries there after he was discharged?

A. Well, I couldn't say for a fact with regard to that. he may have been consulted by the ass't bookkeeper in regard to some matters; but the books would show.

The books that were kept by Darnold were the books of J. R. Boyce & Co.—cash and day book, cash book, journal, day book, and ledger. I don't think I notified Darnold on the 1st of February that he was to be discharged. His discharge was very sudden. I don't think that he knew he was going to be discharged. I didn't think that he was going to be discharged myself.

Redirect Examination.

(By Mr. TOOLE.)

Q. Who took Mr. Darnold's place when he was discharged? A. Mrs. Johnson.

Q. In whose handwriting, then, do the books appear to have been made from the time that she took the place of Mr. Darnold?

A. In her handwriting. There might be possibly an entry where he—I don't think that he made any himself, but he may have dictated to her and assisted her a little. I think he did assist her a little, but probably didn't make an entry.

He has been going through our books recently; not an entry has been made in them. He has just been examining them.

The foregoing comprises all of the testimony on the trial of said cause.

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

Be it remembered that on the 23d day of May, 1894, plaintiff in the above-entitled cause made his request in writing that the Court make certain findings of fact and conclusions of law, separately and severally; which requests were in words and figures as follows, to wit:

Now comes the plaintiff and requests the Court to make the following findings, or findings upon the following matters, viz.:

1. Was there any written assignment of said stock or certificates of stock or power of attorney executed by the donor in connection with the alleged gift?

2. Was there any written authority executed by the donor of any kind empowering the defendant Andrew J. Davis, or any other person for him, to *perform* said stock certificates of stock upon the books of the bank during the lifetime of the donor?

3. Was there any transfer, with or without such authority, of said stock or certificates thereof to the defendant Andrew J. Davis upon the books of said bank during the lifetime of the donor?

4. Did anything represent the donor as a proxy at any meeting in question after the alleged gift and prior to his death?

5. Did the donor act as a stockholder of said bank after the alleged gift?

6. Was the donor elected as president of said bank at a meeting of the stockholders thereof after said alleged

gift, and did he hold said office up to the time of his decease?

7. Was there any gift from the donor to the defendant Andrew J. Davis made or attempted to be made other than that alleged to have been made on the 27th or 28th of December, 1889, or at any times specified in the testimony of the witness James A. Talbott?

8. Was the donor contemplating making a trip or a journey at the time the alleged gift was made?

9. Was this a condition attached by the donor to said gift at the time of making the gift, that is to say: "If I don't come back or anything happens, I want you to have that stock"?

10. Was said gift to take effect prior to the death of said donor?

11. What was the exact language of the donor in making or attempting to make said alleged gift?

12. If any valid gift mortis causa was made, when was it made?

13. If the alleged donee exercised any dominion or control over said stock, did he do so with the knowledge or consent of the alleged donor other than such as is to be inferred from the alleged gift made in the 27th day or 28th day of December, 1889?

14. If he did exercise any such dominion or control, in what way did he do so?

15. Was any possession of said stock delivered to said donee other than that conferred by the alleged gift on the 27th or 28th day of December?

16. If any other possession was given him, in what was it given?

And as matter of law plaintiff requests the Court to find:

1. That said alleged done did not become a shareholder by said alleged gift under the statutes of the United States and by-laws of the bank made in pursuance hereof.

2. That said alleged donee did not succeed to the rights or liabilities of the deceased under said statutes and by-laws.

3. That said donor was not divested of his possession, dominion, and control of said stock under said statutes and by-laws or otherwise.

4. That the alleged gift, being made upon a condition precedent, was inoperative and cannot be aided by a court of equity so as to make it effectual.

5. That the title, control, and dominion over said stock not vesting immediately, but upon a future contingency, by its express terms, was invalid as a gift mortis causa.

6. That the legal title and control and dominion over said stock remaining in the alleged donor at the time of his death, the same vested in the plaintiff as administrator, under the statutes of the United States, who now holds and possesses the same.

7. That said defendant, Andrew J. Davis, is not entitled to have an assignment and power of attorney from the said plaintiff as such administrator authorizing a transfer of said stock upon the books of the bank, nor is he entitled to such transfers of said stock.

8. That under the common law of England, as adopted by the State of Montana, no valid causa mortis was made of said stock.

Filed May 23d, 1894.

And the said plaintiff also filed his motion for decree herein, which — in words and figures as follows, to wit:

[Title of Court and Cause.]

Now comes the plaintiff in the above-entitled action and moves the Court for judgment and decree in his favor upon the evidence introduced herein, and that said Andrew J. Davis, Jr., take nothing by his said answer and cross-complaint, and that the said decree direct the said bank to transfer the stock involved in this controversy to said plaintiff, in pursuance of the prayer of his complaint, for the following reasons, to wit:

1.

Because the evidence in said cause will not authorize a decree requiring an assignment of said certificates or a transfer of said stock to defendant Davis.

2.

Because, if the same is insufficient otherwise to authorize a transfer of said certificates of stock or to make said defendant, Davis, a shareholder in said bank, it is utterly insufficient under the statutes of the United States applicable thereto.

3.

Because — the laws of the United States applicable thereto said defendant, Davis, has neither the legal title or beneficial interest in the shares of stock of said defendant, First National Bank of Butte, and because the plaintiff herein claimed the right thereto under said statutes.

4.

Because the rights of the plaintiff and defendant Andrew J. Davis, as well as to dates and obligations of defendant bank, arise under the laws of the United States.

5.

Because the manner of becoming and rights and liabilities of shareholders are involved, which are created by and arise under the laws of the United States and must be determined by the interpretation thereof.

W. F. SANDERS,
McCONNELL, CLAYBERG & GUNN, and
TOOLE & WALLACE,
Attorneys for Plaintiff.

Filed May 23d, 1894.

And thereafter, on the 24th day of May, 1894, said cause was argued and submitted to the Court, and on the 26th day of May, 1894, the Court refused to and did not make the findings of fact or conclusions of law as requested by plaintiff and to which action of the Court in so doing, as to each of said requests separately and severally and as a whole, the plaintiff then and there and at the time duly excepted in open court.

And the Court on the last day aforesaid, overruled plaintiff's motion for judgment; to which plaintiff then and there and at the time, in open court, duly excepted.

And on the said 25th day of May, 1894, said Court made the following findings of fact and conclusions of law, to wit:

[Title of Court and Cause.]

In this action a trial by jury having been heretofore waived by oral consent of parties, by their attorneys, in open court, entered upon the minutes, the action is tried by the Court, and the Court having heard the evidence and argument of counsel and having considered the case and being fully advised in the premises, finds the following facts and conclusions of law, to wit:

Findings of Fact.

I.

In the latter part of December, 1889, Andrew J. Davis, now deceased, was and had been for some months seriously and dangerously ill and suffering from the disease and ailment from which he afterwards died..

II.

That on or about the 27th of 28th day of December, 1889, at Butte City, in the county of Silver Bow and State of Montana, the said Andrew J. Davis, now deceased, being then seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died and in view and in apprehension and expectation of his death from said disease and ailment, gave to Andrew J. Davis, one of the defendants herein, as a gift, the shares of stock and certificates thereof of The First National Bank of Butte, one of the defendants herein, which are described in the complaint, and at the same time delivered said certificates of stock to the said Andrew J. Davis, one of the defendants herein, as a gift. The said defendant, An-

drew J. Davis, then and there received and accepted the same.

III.

That thereafter, on the 11th day of March, 1890, at Butte City, Montana, the said Andrew J. Davis died from the same disease and ailment from which he was suffering at the time he made the gift and delivery of the said stock and certificates thereof to Andrew J. Davis, one of the defendants herein and as above found.

IV.

That said Andrew J. Davis, one of the defendants herein, has ever since said gift and delivery above found, retained and held in his possession and claimed as his own, and does now so hold in his possession and claim as his own, all of the said shares of stock and the certificates thereof described in the complaint.

V.

That at the time of the gift and delivery of the said shares of stock and certificates thereof by the said Andrew J. Davis, now deceased, to the said Andrew J. Davis, one of the defendants herein, as above found, the said Andrew J. Davis, now deceased, was of sound and disposing mind.

VI.

That at and long prior to the time of the gift and delivery of said said stock and certificates thereof, as above found, the said Andrew J. Davis, now deceased, had and expressed a great affection for and a great confidence in the business capacity and character of the said Andrew J. Davis, one of the defendants herein.

VII.

That at the time of the gift of the stock and certificates thereof, as above found, it was and for several years prior thereto had been the intention of the said Andrew J. Davis, now deceased, to give the said stock and the certificates thereof of the said First National Bank of Butte to the said Andrew J. Davis, one of the defendants herein.

VIII.

The Court further finds as facts:

That there was no written assignment of said stock or certificates of stock or power of attorney executed by the donor in connection with the gift; that there was no written authority executed by the donor of any kind empowering the defendant, Andrew J. Davis, or any other person for him to transfer said stocks or certificates of stock upon the books of the bank during the lifetime of the donor, and that there was no transfer of the stock or the certificates thereof to the defendant, Andrew J. Davis, upon the books of the bank during the lifetime of the donor or ever or at all.

That at a meeting of the stockholders of the said bank held some time after the said gift had been made, and before the death of the donor, John E. Davis, a brother of the defendant Andrew J. Davis was given a proxy in writing by said defendant, which had been signed by the donor, before the date when the gift was made and delivered to defendant Andrew J. Davis before said gift was made; that said John E. Davis, under and by the directions and according to the request of said defendant, An-

drew J. Davis, voted said proxy at said stockholders' meeting; that said John E. Davis had no conversation with the said donor regarding said proxy, and after having voted the same returned it to the defendant Andrew J. Davis, who has ever since retained it.

That the donor was seriously and dangerously ill from a time prior to the date when he made the gift until his death, and did not revoke said gift or exercise any control over said stock or the certificates thereof, nor act as a stockholder of said bank.

That the donor was elected president of said bank after he had made said gift and he continued in that position until his death, but said election was without his knowledge or request, and he had no knowledge of said election of himself as president, or of his holding said position, and never did any act as president of the said bank from the time he made the gift.

That there was no gift made or attempted to be made by the donor to the defendant Andrew J. Davis other than the gift made about the 27tn or 28th of December, 1889, as heretofere found in findings II.

That at the time the donor made the gift he was seriously and dangerously ill, suffering from the ailment and sickness of which he afterwards died, and was contemplating a trip or journey at the time.

That the gift by the donor to the defendant Andrew J. Davis was an absolute gift and was and is a valid gift, mortis causa, and the donee has ever since held possession and exercised control and dominion over said stock with the knowledge of the donor arising and resulting only from the fact of the gift and the donee's possession.

Conclusions of Law.

I.

That the defendant Andrew J. Davis is the owner of the stock and shares and certificates thereof of the First National Bank of Butte, which are described in the complaint herein, and is entitled to have said shares and stock transferred to him on the books of said bank, and to have new certificates issued to him therefor, and that said donor was divested of his possession, dominion, and control of said shares of stock by said gift.

II.

That the plaintiff herein, as special administrator of the estate of Andrew J. Davis, deceased, or otherwise, has not, no*t* has said estate, any right, title, or claim in or to the shares of stock and the certificates thereof described in the complaint or any part thereof.

III.

That the defendant Andrew J. Davis is entitled to a decree herein in accordance with the prayer of this answer, and such decree is hereby ordered entered.

JOHN J. McHATTON,

Judge.

Filed May —, 1894.

To which said findings, separately and severally and as a whole, plaintiff then and there, at the time and in open court, duly excepted.

And on the day last aforesaid, upon motion of defendant, Andrew J. Davis, the court rendered and passed the following decree:

[Title of Court and Cause.]

In this action a trial by jury having been heretofore waived by oral consent of parties by their attorneys, in open court, entered upon the minutes, the action was tried by the court; and the court having heard the evidence and argument of counsel, having heretofore taken the case under advisement, and being now fully advised in the premises and all things being duly considered—

Now, on this 25th day of May, A. D. 1894, in open court, the court makes its findings of fact and conclusions of law in the case, which are herein signed and filed and which are in the words and figures following, to wit:

Findings of Fact.

I.

"That in the latter part of December, 1889, Andrew J. Davis, now deceased, was and had been for some months seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died."

II.

"That on or about the 27th or 28th of December, 1889, at Butte City, in the county of Silver Bow and State of Montana, the said Andrew J. Davis, now deceased, being then seriously and dangerously ill and suffering from the disease and ailment of which he afterwards died, and in view and in apprehension and expectation of his death from said disease and ailment, gave to Andrew J. Davis, one of the defendants herein, as a gift, the shares and stock and certificates thereof of The First National Bank of Butte,

one of the defendants herein, which are described in the complaint, and at the same time delivered said certificates of stock to the said Andrew J. Davis, one of the defendants herein, as a gift. The said defendant, Andrew J. Davis, then and there received and accepted the same."

III.

"That thereafter, on the 11th day of March, 1890, at Butte City, Montana, the said Andrew J. Davis died from the same disease and ailment from which he was suffering at the time he made the gift and delivery of the said stock and certificates thereof to Andrew J. Davis, one of the defendants herein, as above found."

IV.

"That the said Andrew J. Davis, one of the defendants herein, has ever since said gift and delivery above found retained and held in his possession and claimed as his own and does now so hold in his possession and claim as his own all of the said shares of stock and the certificates thereof described in the complaint."

V.

"That at the time of the gift and delivery of said shares and certificates thereof by the said Andrew J. Davis, now deceased, to the said Andrew J. Davis, one of the defendants herein, as above found, the said Andrew J. Davis, now deceased, was of sound and disposing mind."

VI.

"That at and long prior to the time of the gift and delivery of the said stock and certificates thereof, as above found, the said Andrew J. Davis, now deceased, had and

expressed a great affection for and a great confidence in the business capacity and character of the said Andrew J. Davis, one of the defendants herein."

VII.

"That at the time of the gift of the stock and certificates thereof, as above found, it was and for several years prior thereto had been the intention of the said Andrew J. Davis, now deceased, to give the said stock and the certificates thereof of the First National Bank of Butte to the said Andrew J. Davis, one of the defendants herein."

VIII.

"That there was no written assignment of said stock or certificates of stock or power of attorney executed by the donor in connection with the gift; that there was no written authority executed by the donor of any kind empowering the defendant Andrew J. Davis or *to* any other person for him to transfer said stock or certificates of stock upon the books of the bank during the lifetime of the donor, and that there was no transfer of the stock or the certificates thereof to the defendant Andrew J. Davis upon the books of the bank during the lifetime of the donor or ever or at all.

"That at a meeting of the stockholders of the said bank, held some time after said gift had been made and before the death of the donor, John E. Davis, a brother of the defendant, Andrew J. Davis, was given a proxy in writing by said defendant, which had been signed by the donor, before the date when the goft was made and delivered to said defendant, Andrew J. Davis, before said

gift was made; that said John E. Davis, under and by the directions and according to the request of said defendant, Andrew J. Davis, voted said proxy at said stockholders' meeting; that said John E. Davis had no conversation with the said donor regarding said proxy, and after having voted the same returned it to the defendant Andrew J. Davis, who has ever since retained it.

"That the donor was seriously and dangerously ill from a time prior to the date when he made the gift until his death, and did not revoke said gift nor exercise any control over said stock or the certificates thereof, nor act as a stockholder of said bank; that the said donor was elected president of said bank after he had made said gift, and he continued in that position until his death, but said election was without his knowledge or request and he had no knowledge of said election of himself as president or of his holding said position and never did any act as president of said bank from the time he made the gift.

"That there was no gift made or attempted to be made by the donor to the defendant Andrew J. Davis other than the gift made about the 27th or 28th day of December, 1889, as heretofore found in finding II.

"That at the time the donor made said gift he was seriously and dangerously ill, suffering from the ailment and sickness of which he afterwards died and was contemplating making a trip or journey at the time.

"That the gift by the donor to the defendant Andrew J. Davis was an absolute gift and was and is a valid gift mortis causa, and the donee has ever since held possession and exercised control and dominion over said stock,

with the knowledge of the donor, arising and resulting only from the fact of the gift and the donee's possession."

Conclusions of Law.

I.

"That the defendant Andrew J. Davis is the owner of the stock and shares and certificates thereof of the said First National Bank of Butte, which are described in the complaint herein, and is entitled to have said shares and stock transferred to him on the books of said bank, and to have new certificates issued to him therefor, and that said donor was divested of his possession, dominion, and control of said shares of stock by said gift."

II.

"That the plaintiff herein, as special administrator of the estate of Andrew J. Davis, deceased, or otherwise, has not, nor has said estate any right, title, or claim in or to the shares of stock and the certificates thereof described in the complaint or any part thereof."

III.

"That the defendant Andrew J. Davis is entitled to a decree herein in accordance with the prayer of his answer, and such decree is hereby ordered entered."

And thereupon it is by the Court ordered, adjudged, and decreed, in open court, on this 25th day of May, A. D. 1894, that plaintiff take nothing by his complaint herein; that defendant Andrew J. Davis is the owner of each and all of the shares of said stock and of the certificates thereof of the said First National Bank of Butte, which are described in the complaint herein as follows, to wit:

Nine hundred and fifty (950) shares of the capital stock of The First National Bank of Butte, Montana, one of the defendants herein, consisting of and represented by certificate No. 10, for four hundred and eighty-one (481) shares; certificate No. 14, for three hundred and forty-three (343) shares; certificate No. 22, for one hundred and sixteen (116) shares, and certificate No. 25, for ten (10) shares; and said Andrew J. Davis, defendant herein, is entitled to have each and all of said shares transferred to him on the books of said bank; that plaintiff, as special administrator of said estate of Andrew J. Davis, deceased, or otherwise, has not, nor has said estate any right, title, or claim of said shares of stock or the certificates thereof or any part thereof; that the First National Bank of Butte, one of the defendants herein, having appeared and answered herein, stating that it is ready and willing to comply with any order that the Court may make herein, be, and is hereby, ordered to transfer upon the books of said bank to Andrew J. Davis, one of the defendants herein, all of the shares and stock above described and mentioned in the certificates above mentioned, and to issue to said Andrew J. Davis, defendant, new and proper certificates therefor; and it is further considered and adjudged by the Court that the said defendant, Andrew J. Davis, have and recover of plaintiff herein or of the estate of the said Andrew J. Davis, now deceased, his defendant's costs and disbursements herein taxed, forty-six and 40-100 ($46.40) dollars.

Dated May 25th, 1894, and signed.

JOHN J. McHATTON,

Judge.

Be it remembered that on the 23d day of May, A. D. 1894, the plaintiff in the above-entitled action submitted to the Court his several requests for findings of facts; which several requests for findings of facts were separately and severally submitted to the Court; and also certain requests upon questions of law; a portion of which said findings of facts and questions of law were not found by the Court, and in which respect the said plaintiff, by his attorney, in open court, then and there duly excepted to each thereof separate and severally; and the Court thereupon found certain facts and conclusions of law and filed the same with the clerk; to each and every such findings of facts and conclusions of law the said plaintiff by his attorneys in open court, then and there duly excepted.

And the said plaintiff having also filed his motion for judgment and decree upon the evidence herein, the same, being considered by the Court, was overruled, and to each ruling the plaintiff then and there, in open court, duly excepted, and his bill of exceptions was signed, sealed, and made a part of the records herein.

Filed May 25th, 1894.

To which plaintiff then and there and at the time and in open court excepted, and this his bill of exceptions is here and now, in open court, duly signed and made a part of the records herein this 25th day of May, A. D. 1894.

JOHN J. McHATTON,

Judge.

[Title of Court, Title of Cause.]

And upon the rendition of said decree upon the motion of plaintiff it was ordered that plaintiff have thirty days from and after the filing of the notice of motion for a new trial to prepare, serve, and file his statement and affidavits for a new trial herein; which said order was made, by consent of parties, in open court on the 25th day of May, 1894.

[Title of Court and Cause.]

Now comes the plaintiff in the above-entitled cause, being the party aggrieved therein, and within ten days after notice of the findings and decisions of the Court and the filing thereof gives notice of his intention to apply and move for a new trial herein and designates the following grounds therefor, viz:

I.

Newly discovered evidence material for the plaintiff making the motion and application.

II.

Insufficiency of the evidence to justify the findings and decision of the Court, and that the same are against law.

III.

Errors of law occurring at the trial and excepted to by the party making the motion and application.

The said application and motion will be made upon a statement of the case to be served and filed within thirty days from the service and filing of this notice, in accord-

ance with the order of the Court in which this action is pending and heretofore made therein, and upon affidavits filed and served within the statutory time allowed therefor.

W. F. SANDERS,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Plaintiff.

Service of the within is hereby admitted and copy received this 4th day of June, 1894.

M. KIRKPATRICK,
FORBIS & FORBIS, and
W. W. DIXON,
Attorneys for Defendants.

Filed June 4th, 1894.

[Title of Court, Title of Cause.]

Whereas it has been heretofore stipulated and agreed between the parties hereto that the time for preparing affidavits and statement on motion for new trial be extended thirty days from and after the filing of notice of motion for new trial; and

Whereas an order of Court has been duly made extending said time accordingly, which expires on the fourth inst.; and

Whereas the defendants, the adverse parties, are willing and consent to a further extension of time for preparing, serving, and filing of said affidavits and statement on motion for new trial:

Now, therefore, it is hereby stipulated and agreed that said court or the judge thereof may make an order ex-

tending said time for the purposes aforesaid for the space of twenty days from and after the date hereof, and that the said defendants have twenty days from and after the filing and service of said affidavits and statement to file and serve counter-affidavits and amendments to said statement, the extensions aforesaid being conceded to be necessary and proper in the matter of said motion and application.

Dated this second day of July, A. D. 1894.

W. F. SANDERS,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Plaintiff.

M. KIRKPATRICK,
FORBIS & FORBIS, and
W. W. DIXON,
Attorneys for Defendants.

For good and sufficient cause shown, the time for preparing, serving, and filing affidavits and statement on motion for new trial on the part of the plaintiff is hereby extended for twenty days, and the time for filing counter-affidavits and amendments—said statement is also extended for twenty days after the filing and service of said affidavits upon said defendants or their attorneys, all of which is done by the consent of the parties hereto and in pursuance of the foregoing stipulation.

Given under by hand this second day of July, A. D. 1894.

JOHN J. McHATTON,
Judge of said Court.

And within the time allowed for that purpose, in pursuance of said stipulations and orders of court in that behalf and in accordance with his notice of motion therefor, plaintiff comes now and makes this his motion and application for a new trial, and as a part thereof specifies the particular grounds therefor as follows, to wit:

I.

Newly discovered evidence material for the plaintiff in making the motion and application, as will appear from the affidavits herein.

II.

Insufficiency of the evidence to justify the finding and decision of the Court, and that the same are against law in this, to wit:

a. The evidence fails to show that there was any written assignments of said certificates of stock.

b. It fails to show that there was any power of attorney or instrument in writing executed in connection with the alleged gift authorizing the transfer or assignment of said stock or the transfer thereof on the books of defendant bank.

c. It does not show that the legal title to said certificates of stock was ever transferred or assigned to the alleged donee therof.

d. It does not show that said donee ever acquired the beneficial interest in said stock.

e. It does not show that said donee ever became a stockholder in said bank.

f. It does not show that said alleged gift was ever perfected or that said alleged said donee was ever subjected

to the liabilities or entitled to the dividends or benefits of said alleged gift by becoming a shareholder or stockholder in said bank or otherwise.

g. It does not show that said alleged gift was perfected so as to substitute said alleged donor to the rights of said alleged donee.

h. The evidence fails to show that said alleged donee acquired any legal or equitable title to said stock, or that a court of equity had jurisdiction to supply or perfect the right thus left imperfect by the alleged donor.

i. The evidence shows that said alleged donee acquired no rights as a shareholder or stockholder in said bank, and that he was not subjected to any liabilities on account thereof as provided by the acts of Congress in that behalf or by the by-laws of said bank.

j. It shows that said alleged donee retained possession, dominion, and control of the stock in said bank after the alleged gift and up to his death.

k. It shows that said alleged donee never acquired possession, dominion, or control of said stock during the lifetime of said deceased, and that he could not—so under the said laws of the United States or by the by-laws of said bank, made for the protection of the public and those dealing with said bank.

l. It shows that the possession, dominion, and control of the stock of said bank designated in said certificates was held and exercised by said alleged donee during his lifetime and after said alleged gift, and that he was represented by proxy in voting and controlling of the same.

m. It shows that the alleged donor acted as a stockholder or shareholder in said bank after the alleged gift during his lifetime.

n. It shows that said alleged gift was made contingent upon said alleged donor's return from his trip to Tacoma, and that he did return from said trip.

o. It shows that said gift was not a gift in presenti; that it was not perfected as such, but was made upon condition of the alleged donor's death.

p. It shows that the alleged gift was upon a condition precedent and was not a perfect gift subject to be defeated by conditions subsequent.

q. The evidence only shows an intention to make a gift, and that no pretended gift was made or attempted to be made except that claimed to have been made at the writing desk, at the alleged donee's residence, in the presence of plaintiff and the alleged donee and donor, on the 27th or 28th day of December, 1889, which failed to show any assignment of said stock or the certificates thereof, or any power of attorney authorizing the same, or any transfer or authority to transfer the same upon the books of the bank, and it expressly shows said alleged gift to be conditional, imperfect, and invalid, and that it was made, if made at all, according to the testimony of the only witness to said alleged gift, to depend upon an accident or something happening to him on his said trip to Tacoma or his failure to return, and that said alleged gift was on account thereof invalid.

r. Because the evidence shows without contradiction that the only gift claimed or sought to be proven was on the 27th or 28th day of December, 1889, and because the only witness testifying to said gift stated in his testimony that he was sure that in making the alleged gift the donor said at the time that it was to be the donee's if anything happened to him on his said trip.

s. That all evidence as to any gift made or intended to be made must and does refer to said pretended gift on the said 27th or 28th day of December, 1889, and does not and cannot extend or enlarge the effect thereof, which was and is incomplete as a gift causa mortis.

t. It shows that the alleged donee was elected as an officer of said bank after said alleged gift and was a stockholder and the only one authorized to possess and control said stock under the laws of the United States.

u. Because the evidence without any conflict therein refers to the alleged gift on the 27th or 28th day of December, 1889; that it was made in contemplation of a trip from Butte, Montana, to Tacoma, Washington, and was expressly and without consideration in these words: "If I don't come back or anything happens, I want you to have that stock," and does not constitute a gift at common law, in force in this State, and could not be such under the statutes of the United States applicable to the transfer of stock in national banks.

v. It does not show that said alleged gift was to take effect prior to the death of the alleged donor.

w. It does now show that said alleged donee exercised any possession, dominion, or control of said stock during the lifetime of the donee; that he ever received any dividends or benefits thereof or was authorized to receive any, or that under the alleged gift he was ever admitted or registered as a stockholder or a shareholder or entitled to be, or that he was ever subjected to any liabilities as a stockholder under the laws of the United States or otherwise, or that he ever voted said stock or controlled the voting thereof with the knowledge or consent of the alleged donors.

x. The by-laws in evidence show that there was no gift causa mortis of said stock.

y. The evidence shows only an intention to give and that no gift was perfected during the lifetime of the alleged donor, and fails to show that said alleged gift was in contemplation of death, proximate or otherwise, from any disease with which the alleged donor was then suffering, and that said alleged gift was testamentary in its character and was intended to be perfected by will thereafter to be drawn, and is therefore invalid.

z. The evidence upon which said alleged gift is based is not certain, definite, and unequivocal that any such gift was made, and is therefore insufficient in law.

III.

Errors in law occurring at the trial and excepted to by the plaintiff, that party making this motion and application, in this, to wit:

The court erred:

a. In admitting evidence of the estimate of the alleged donor of the business qualifications of the alleged donee.

b. In admitting evidence of the affection of the said donor for said donee.

c. In admitting evidence of the intention of the said donee to make said gift.

d. In admitting any evidence of the alleged gift except the words and transaction used and had at the time the same is alleged to have been made and the only gift claimed or sought to be proven.

e. In admitting evidence tending to show an intention on the part of the alleged donor to give upon his death

or any other condition or contingency to establish the alleged gift causa mortis.

f. In admitting the evidence of John E. Davis that the alleged donee directing him in casting the votes of the alleged donee as his proxy.

g. In overruling the objection of plaintiff to the interrogation calling for said evidence and in not striking out the same on his motion.

h. Overruling plaintiff's objection to the introduction in evidence of the inventory and supplemental inventory of the estate of the said alleged donor, and in admitting the same.

i. In not finding upon all of the special findings requested by plaintiff.

j. In not finding in each or any separately and severally of the special findings so requested.

k. By making the findings it did make in said cause.

l. In overruling plaintiff's motion for judgment and in rendering a decree for defendant Davis.

m. In directing a transfer of the said stock upon the books of the bank.

n. In directing the perfection by which the decree itself appears to be imperfected.

o. In trans-ending the powers of the court in making and perfecting a gift for the stock in question from the alleged donor to the alleged donee.

p. In that said decree is in violation of the laws of the United States and by-laws of the bank.

q. In that it divests the estate of a legal and beneficial title to said stock without any consideration therefor and upon a pretended gift causa mortis, which could only have been done and perfected by the donor.

r. The court has no jurisdiction by said decree under the laws of the United States to make said defendant, Davis, a shareholder in said bank.

s. No discretion under said laws is vested in said court to substitute said alleged *said* donee for said alleged donor or relieve said donor or his estate of the liability as such stockholder and substitute said alleged donee therefor.

t. The court erred in not entertaining or passing upon the Federal question involved, and in not pursuing the rules of the common law adopted by statute in this State requiring the assignment of said stock to be in.

u. The court erred in other matters in the particular specified in the foregoing statement and hereby incorporated in this specification of errors and hereby expressly referred to.

Service of the copy of the foregoing statement of motion for new trial this day received and accepted, in pursuance of a stipulation and order heretofore made and entered in said cause.

Dated July 19th, 1894.

M. KIRKPATRICK,
FORBIS & FORBIS,
W. W. DIXON,
Attorneys for Defendants.

We, the undersigned attorneys for the plaintiff and defendant in the above-entitled cause, hereby agree to the foregoing statement on motion for a new trial as amended to be correct and accept and receive the same accordingly.

W. F. SANDERS,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Plaintiff.

M. KIRKPATRICK,
W. W. DIXON,
FORBIS & FORBIS,
Attorneys for Defendants.

I hereby certify that the foregoing statement and record has been settled, and that the same is allowed, and I authorize and direct the filing thereof by the clerk of this court.

August 11th, 1894.

JOHN J. McHATTON,
Judge.

[Title of Court and Cause.]

State of Montana, }
County of Silver Bow. } ss.

James R. Boyce, Junior, being first duly sworn, on his oath does say that he is fifty years of age and a resident of Butte city, Silver Bow county, and State of Montana, and that he has resided there for fourteen (14) years last past; that he is well acquainted with one W. C. Darnold, who

was a witness in above-entitled action, on the trial thereof in May last, on the part of the defendant therein; that he had a conversation with W. C. Darnold about the 1st day of July, A. D. 1894; he, Darnold, had been absent from Butte city about three (3) weeks and returned on or about the 1st day of July, A. D. 1894, from a trip east; he, Darnold, said he had been to Piqua, Ohio, visiting his old home; he said he had a choice of going to California or going to Piqua, and that he had preferred to go to Piqua, which choice was given to him by Mr. Meyer Gansburger; that he said he could go where he pleased, he had his choice; he said he had been chaperoned over the country by Meyer Gansberger, and that he was glad to get back; he said he had demanded a return ticket before he left in order that he could get back here in the event that his testimony might be necessary in cases now pending in court with eastern creditors and J. R. Boyce, Jr., and Company; that he had demanded this return ticket and got it; he said that he testified on behalf of Andy Davis on the trial of the above cause, inasmuch as he believed it would be to his interest to do so from a pecuniary standpoint, and that it would not hurt me in my cases that would follow, as my action would be against the bank, and that he desired to strengthen the bank as much as possible, but that his testimony on the trial of the case was not true; that his conversation with Judge Davis was in August, 1886, wherein Andy had discharged him in August, 1886, and that he had gone to Judge Davis and reported to him that Andy had discharged him for opening a ledger at the end of the month, instead of opening it at the first of the month, as Andy wished him to, for

transferring accounts from one ledger to the other, and that the Judge had told him to go back to Andy and apologize, for some day he might be the owner of the bank and that this conversation occurred in August, 1886, instead of February, 1890. He stated that he never had a conversation with Judge Davis after that time on the subject of Andy becoming the owner of the bank, and that this conversation of February, 1890, which was given in his testimony in behalf of the supposed gift by Judge Davis, which he had testified to on the trial, was not true.

On July 6th, Darnold came to me and asked me to accompany him to the residence of John H. Curtis; that he has heard read the affidavit of John H. Curtis made the day in the above cause with reference to said conversation, and that the statement of said Curtis as to said conversation is correct, and in accordance with my memory of the same.

On the 11th day of July, A. D. 1894, Darnold asked me to go with him to see Mr. Stapleton; that he wanted to correct the testimony he had given upon the trial of this case. We went to Mr. Stapleton's room in the Butte hotel, where said Darnold made the following statement in substance in the presence of Mr. Stapleton:

He, Darnold, there stated that his former statements on the trial were not true and that he wanted to correct them; that he did not feel right over it; that his conscience had troubled him and that he wanted to correct the statement. He then stated that the only conversation he ever had with Judge Davis concerning Andy owning the bank was in August, 1886.

Affiant further says that on the day of the funeral of Judge Davis, Andrew J. Davis, Junior, had a conversa-

tion with him with reference to the bank stock and wanted to know what I knew about it. Shortly after this I met Mr. Talbott on the corner of Jackson and Galena streets, in front of his residence, and had a conversation with him in reference to Andrew and the bank stock, in which he stated in substance that Judge Davis had given Andy the stock upon condition that he did not return from Tacoma on the sound, and that he did not believe he could legally hold it for the reason that it was made upon condition that he, Judge Davis, did not return, and that Judge Davis did return, and for this reason he did not believe that Andy could hold it.

Affiant further says that he has given the dates of the conversation above referred to as near as he can, and, while he may not be correct as to dates, he is certain as— the facts detailed in this affidavit.

Affiant further says that he had, during the progress of the trial of this case, some controversy pending between James R. Boyce, Junior, and Company and the bank, and that he was trying to make a compromise of it, and that he did not detail to the attorneys the facts hereinbefore last stated for the reason that he was fearful that it might interfere with the compromise and of what he thought would result in a settlement of it, and that he has not communicated the same to the attorneys or to the plaintiff in the case until since the termination of the trial of the above-entitled cause.

And further affiant saith not.

JAMES R. BOYCE, Jr.

Subscribed and sworn to before me this —— day of July, A. D. 1894.

FRANK E. CORBETT,

Notary Public in and for the County of Silver Bow and State of Montana,

Due and sufficient service of the foregoing affidavit acknowledged by copy this 21st day of July, A. D. 1894.

M. KIRKPATRICK,
FORBIS & FORBIS, and
W. W. DIXON,
Attorneys for Defendants.

Filed July 21st, 1894.

[Title of Court, Title of Cause.]

State of Montana, }
County of Silver Bow. } ss.

John H. Curtis, being first duly sworn, on his oath doth say that he is fifty-four years of age; that he is a resident of the city of Butte, county of Silver Bow and State of Montana, and that he has been a resident of Silver Bow county about fourteen (14) years, and has been a resident of the State of Montana for about twenty-eight (28) years.

That he heard a conversation between James R. Boyce, Junior, and W. C. Darnold, who was a witness in the case aforesaid on the trial thereof in the above-entitled court in the month of May, A. D. 1894, at my residence, in the city of Butte, county of Silver Bow and State of Montana, about the 10th day of July, A. D. 1894; that I heard Darnold make a statement in said conversation to Mr. Boyce which was in substance as follows, to wit: That he, Darnold, had made a demand upon Mr. Davis to give him

ten thousand dollars ($10,000.00), which would enable him to go into business in his own town in Ohio, and that if they did not give it he intended to go—the attorneys and tell them that he misrepresented his statements on the witness stand. Mr. Boyce remarked, Darnold, you know that I warned you before the trial to confine yourself to the truth in this case, and Darnold remarked, Well, Mr. Boyce, I am trying to do the best I can for myself, and in doing that I want to aid you in getting your claim; and he, Darnold, turned around and asked me if that was not right. I answered him no; that Boyce's is a legitimate claim, which he can contest for in his own rights in a legal way, and your claim is an illegitimate claim, and the penitentiary would be your doom if it was found out that you lied in this testimony. That I have not communicated this conversation to the plaintiff or his counsel, or to anybody until now. I kept this to myself.

And affiant further saith not.

JOHN H. CURTIS.

Subscribed and sworn to before me this 21st day of July, A. D. 1894.

[Seal] FRANK E. CORBETT,

Notary Public in and for the County of Silver Bow and State of Montana,

Due and sufficient service of the foregoing affidavit acknowledged by copy this 21st day of July, 1894.

M. KIRKPATRICK,
FORBIS & FORBIS, and
W. W. DIXON,
Attorneys for Defendants.

Filed July 21st, 1894.

[Title of Court and Cause.]

State of Minnesota, }
County of Douglas. } ss.

John B. Wellcome came personally before me and, being first duly sworn, on his oath doth say: I am acquainted with W. C. Darnold, a witness who testified in behalf of the defendant in the above-entitled action. Some time before the above-entitled action was commenced I had a conversation with the said Darnold at my office, in Butte, Montana, which conversation was had in the presence of James R. Boyce, Jr., and which conversation related to the knowledge possessed by W. C. Darnold of facts connected with the transfer of the stock of the First National Bank of Butte from Andrew J. Davis, deceased, to Andrew J. Davis, Jr. We were talking about a suit which Mr. Boyce proposed to bring against the First National Bank, when Mr. Darnold said that he considered it strange that he had not been called upon to testify in the Davis will case. As I, the affiant, am one of the attorneys for the contestant in the Davis will case, I inquired of Mr. Darnold as to what he would testify to should he be called upon. Mr. Darnold then explained that he knew nothing in regard to the will, but that his testimony would be valuable to Andrew J. Davis, Jr., in securing to Andrew J. Davis, Jr., the stock of the First National Bank. I then asked Mr. Darnold what he knew respecting the matter, and he said at one time he was employed in the First National Bank as bookkeeper; that this was some time prior to the death of Andrew J. Da-

vis, Sr.; that Andrew J. Davis, Jr., was employed in the bank at the same time; that he, Darnold, had had some difficulty or disagreement with Andrew J. Davis, Jr., and that thereupon he went to Andrew J. Davis, Jr., and told him that he did not wish to continue longer in the employ of the bank, as he could not get along with Andrew J. Davis, Jr.; that Andrew J. Davis, Sr., then said, "Mr. Darnold, you should not take exception to anything Andy says or does, as he will some time own this bank. In fact, he does own it now." I then asked Mr. Darnold when this conversation occurred. He said he could not give the exact date of it, but it was some time before the death of Andrew J. Davis, Sr., and some time before Andrew J. Davis, Sr., started for the Pacific Coast. I then asked Mr. Darnold if he had any conversation with Andrew J. Davis, Sr., in regard to Andy and the bank stock after the return of Andrew J. Davis, Sr., from the coast, and he replied that he had not. He said he left the bank immediately after having the conversation with Andrew J. Davis, Sr., as hereinbefore set forth, and that after that time he had no conversation whatever with Mr. Davis, the deceased. I then told Mr. Darnold that I did not think his testimony was material to either side, and he said he thought it might be used by Andy in establishing the fact that Andrew J. Davis, Sr., intended to give him (Andy) the bank. I could see from Mr. Darnold's manner and conversation that he thought that I (the affiant) was one of the attorneys for Andrew J. Davis, Jr. I

then told him I was retained for the contestant in the will case, and that my interest and the interests of my client were opposed to Andrew J. Davis, Jr. He then said that he thought I was the attorney for Andrew. Darnold made no mention whatever at that or any other time of any conversation had with Andrew J. Davis, Sr., after the return of the latter from the Pacific coast. In answer to the question as to whether any such conversation occurred he expressly stated that none had occurred, and that the conversation as given above was the only conversation he ever had with Andrew J. Davis, Sr., touching the question of Andrew's interest in the bank. As one of the attorneys for the Root interest in this controversy, I was particular in examining and questioning Mr. Darnold carefully as to what he knew touching the claim of Andrew J. Davis, Jr., to the stock of the First National Bank.

JOHN B. WELLCOME.

Subscribed and sworn to before me this 19th day of July, A. D. 1894.

[Notarial Seal]

GEO. L. TREAT,
Notary Public, Minnesota.

Filed July 24th, 1894.

[Title of Court and Cause.]

Defendant Andrew J. Davis moves the court to strike from the files and not to consider upon plaintiff's motion for a new trial herein the affidavit of John B. Wellcome,

herein purporting to be filed on the twenty-fourth day of July, A. D. 1894, for the reason that said affidavit was not filed or served within the time required by law or by stipulation of the parties and the order of the Court herein made on the second day of July, A. D. 1894.

M. KIRKPATRICK,
FORBIS & FORBIS, and
W. W. DIXON,
Attorneys for Defendants.

The plaintiff and his attorneys in the above-entitled action are hereby notified that defendant will bring on the above motion for hearing before the above-entitled court or the Judge thereof upon the settlement of the statement on motion for new trial herein, or upon the hearing of said motion for new trial, as said court or Judge may direct.

M. KIRKPATRICK,
FORBIS & FORBIS, and
W. W. DIXON,
Attorneys for Defendants.

Service of foregoing motion and notice by copy acknowledged this 31st day of July, A. D. 1894.

Rec'd copy foregoing this 31st day July, 1894.

McCONNELL, CLAYBERG & GUNN,
Attorneys for Plaintiff.

Filed August 1st, 1894.